144-202

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 240.

THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILLARD C. HAWTHORNE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

FILED OCTOBER 13, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 240

THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILLARD C. HAWTHORNE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

INDEX.

	Original.	Print.
Transcript from district court	1	1
Complaint	1	1
Demurrer to complaint	4	3
Order withdrawing demurrer, &c.	5	3
Answer	5	4
Demurrer to answer	7	6
Reply to answer	8	6
Order granting motion to take deposition of John O. Baker	10	8
Order to publish deposition of John O. Baker	10	8
Minutes of trial and verdict	10	9
Order as to motion for new trial, &c.	11	9
Judgment	11	9
Statement of facts	12	10
Testimony of Wm. D. Koslowski	12	10
A. L. Spencer	17	16
A. P. Spaulding	31	31
Henry Shehan	36	38
William Morris	39	41
George W. Bullene	43	46
Charles F. Reitze	46	51
John S. Anderson	48	53
T. D. Brown	50	55
Dr. E. L. Smith	53	59

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 8, 1891.

	Original.	Print.
Testimony of H. H. Hawthorne	54	59
John O. Baker	58	64
P. B. M. Miller	62	69
Mrs. Hawthorne	69	77
S. F. Tichener	74	83
W. C. Hawthorne	75	84
Dr. Willard	81	92
Defendant's opening	82	93
Testimony of C. M. Spaulding	85	95
E. E Plummer	86	96
H. G. Smith	86	97
Dr. E. L. Smith (recalled)	93	106
Dr. J. S. M. Smart	109	124
William Campbell	117	133
J. M. Colman	121	139
Dr. Rufus Willard (recalled)	123	141
Dr. G. A. Weed	135	155
Dr. P. B. M. Miller (recalled)	143	164
Dr. Kreigk	147	169
W. C. Hawthorne (recalled)	149	171
Mrs. Hawthorne (recalled)	150	172
Defendant's instructions	153	175
Closing address to jury by plaintiff's counsel	156	178
Instructions of court to jury	166	189
Order as to motion for new trial	177	200
Motion for new trial	177	200
Affidavit of F. M. Dudley	180	203
Exceptions to charge	181	203
Judge's certificate to statement of facts	184	206
Order allowing appeal	185	206
Bond	185	207
Assignment of errors	187	208
Clerk's certificate	193	214
Writ of error	194	214
Return to writ of error	196	215
Opinion	197	215
Judgment	204	219
Order allowing writ of error, &c.	205	219
Cost bill	207	220
Citation	208	221
Proof of service of citation	209	221
Assignment of errors	211	222
Bond	213	222
Memorandum of costs	215	224
Clerk's certificate	216	224

1 TERRITORY OF WASHINGTON, Third Judicial District, } *ss:*

In the District Court of the Third Judicial District, Holding Terms at Seattle.

WILLARD C. HAWTHORNE
vs.
THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY.

Complaint.

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle, King County, in said Territory.

WILLARD C. HAWTHORNE, Plaintiff,
vs.
THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Defendant. } Complaint.

The plaintiff complains and alleges:

I.

That at all the times herein mentioned the defendant was, and now is, a corporation duly organized under the laws of the Territory of Washington, and authorized to hold property and transact business therein.

II.

That said defendant at all of the said times was, and now is, the owner of a certain steam saw-mill in the city of Seattle, in said county of King, which said saw-mill was at all the said times operated and used by said defendant for its benefit.

III.

That the plaintiff, on the 28th day of October, 1885, at the time of the committing of the grievances hereinafter mentioned, was in the employment of the defendant and operating, under its direction, a certain machine in said saw-mill known as a trimmer, the property of the defendant, driven by steam in said saw-mill, under said defendant's charge and direction and for its benefit, and it was the duty of the defendant to provide a good, safe, and secure trimmer, with good, safe, and secure machinery and apparatus for the operation of the same.

IV.

That the defendant, not regarding its duty, conducted
2 itself so carelessly, negligently, and unskillfully in that behalf that it provided and used an unsafe, defective, and inse-

cure trimmer and unsafe and insecure machinery and apparatus for the operation of the same, of which said defendant at all times had full notice.

V.

That the said plaintiff had no knowledge or notice or means of knowledge of the unsafe, defective, or insecure condition of the said trimmer or said machinery or apparatus until he received the injury hereinafter mentioned in the 6th paragraph of this complaint.

VI.

That for want of due care and attention on the part of the said defendant to its duty in that behalf, on the 28th day of October, 1885, at the said city of Seattle, county of King, and while the said trimmer was in the use and service of the said defendant in said saw-mill, and while the plaintiff was operating the same, in the capacity aforesaid, for the said defendant and under its direction, one of the pulleys over which run the belt which transmitted the power to the saw which formed a part of the said trimmer, without any fault or lack of care on the part of the said plaintiff, but solely on account of the unsafe and insecure condition of said trimmer and the said machinery and apparatus for the operation of the same, slipped from the shaft on which said pulley was revolving and fell a distance of about 8 feet and struck said plaintiff on the head and left side, greatly injuring and bruising him on the head and left side and left arm and other parts of the body.

VII.

That by reason thereof the plaintiff then and there became and for a long time thereafter remained ill, and has never recovered sufficiently to allow him to do or perform any work whatever, and was obliged to and did expend about the sum of $175.00 in attempting the cure of himself, and has ever since the said 28th day of October, 1885, been prevented from pursuing his business and from doing any work whatever and from providing for his support and maintenance, and received great and permanent mental and bodily injury, thereby rendering him ever incapable of performing any work whatever and for providing for his support and maintenance, and undergone and still is undergoing great mental and bodily pain, and has been hindered and prevented for a long period from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of great gains, profits, and advantages which he otherwise would derive and acquire, and was otherwise damaged in the sum of $15,000.00.

Wherefore plaintiff prays that he may recover of and from the said defendant the sum of $15,000.00, together with his costs and disbursements herein.

STRUVE, HAINES & McMICKEN,
Attorneys for Plaintiff.

3 TERRITORY OF WASHINGTON, } ss:
County of King, }

Willard C. Hawthorne, being first duly sworn, on oath says that he is the plaintiff in the above-entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and believes the same to be true.

WILLARD C. HAWTHORNE.

Subscribed and sworn to before me this 16th day of Sept., 1886.

MAURICE McMICKEN,
Notary Public in and for King Co., Washington Territory.

Endorsements: No. 5017. In the district court, third judicial district, holding terms at Seattle, W. T. W. C. Hawthorne, plaintiff, *vs.* Columbia and Puget Sound R. R. Co., defendant. Complaint. Filed Sep. 20, 1886. James Seavey, clerk, by James P. Ludlow, deputy clerk. Struve, Haines & McMicken, attorneys for plaintiff.

4 *Demurrer to Complaint.*

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle, King County, W. T.

WILLARD C. HAWTHORNE, Plaintiff,
vs.
COLUMBIA & PUGET SOUND RAILROAD COMPANY, Defendant.
} No. 5017.

Defendant demurs to the complaint herein and says that the same does not state facts sufficient to constitute a cause of action.

McNAUGHT & CO.,
Attorneys for Defendant.

Endorsements: No. 5017. In the district court, 3d judicial district, holding terms at Seattle, Washington Territory. W. C. Hawthorne, plaintiff, *vs.* C. & P. S. R. R. Co., defendant. Demurrer. Filed Oct. 19, 1886. James Seavey, clerk, by James P. Ludlow, deputy clerk. McNaught, Ferry, McNaught and Mitchell, attorneys for def't. Received true copy of the within demurrer this 19th day of October, 1886. Struve, Haines and McMicken, attorneys for pl't'ff.

5 Journal M, page 56.

THURSDAY, *December 16th*, 1886.

* * * * * * *

W. C. HAWTHORNE
vs.
COLUMBIA AND PUGET SOUND RAILROAD COMPANY.
} 5017. Demurrer Withdrawn.

The demurrer herein is here and now withdrawn, and defendant is allowed twenty days within which to plead.

Answer.

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle, King County, Washington Territory.

WILLIAM C. HAWTHORN, Plaintiff, *v.* COLUMBIA & PUGET SOUND RAILROAD COMPANY, Defendant.	Answer.

1.

The defendant denies each and every allegation contained in the fourth and fifth paragraphs of said complaint.

2.

Said defendant denies each and every allegation contained in the sixth paragraph of said complaint except the allegation that on the 28th day of October, at the city of Seattle, in the county of King, and while the said trimmer was in the use and service of the said defendant in the said mill, while plaintiff was operating the same in the capacity aforesaid for the said defendant, one of the pulleys over which run the belt which transmitted the power to the saw, which formed a part of the said trimmer, slipped from the shaft on which the said pulley was revolving and fell a distance of about eight feet and struck the plaintiff.

3.

That as to the allegations contained in the seventh paragraph of said complaint the said defendant has not any knowledge or information sufficient to form a belief.

And for other, further, and affirmative defense the defendant avers:

1.

6 That the plaintiff, at the time of receiving the injury complained of and set forth in said plaintiff's complaint, *the plaintiff* was employed by said defendant to superintend, run, manage, and operate the trimmer mentioned and described in the plaintiff's complaint.

2.

That said plaintiff continuously superintended, ran, managed, and operated said trimmer for twenty-eight days prior to the time of the accident mentioned in said complaint, to wit, from October 1st to October 28th, 1885.

3.

That the pulley mentioned in the said complaint and each and every part of said trimmer was during the said time under the exclusive management and control of said plaintiff, and was so constructed that during all of said time plaintiff, in operating, managing, and controlling the same, could see each and every part thereof, and that said plaintiff at the time of said accident, and for a long time prior thereto, had as full and perfect knowledge of the peculiar structure and condition of the said trimmer as had said defendant.

4.

That during said twenty-eight days and all of the time that the plaintiff was superintending, managing, controlling, and running said trimmer it was the duty of said plaintiff to oil said trimmer at least twice each and every day while — the same and keep the same in repair.

5.

That the said plaintiff on the said 28th day of October, 1885, although superintending, running, managing, and operating the said trimmer, negligently and carelessly failed to oil and keep said trimmer in running condition, and that whatever injuries the plaintiff received on said day by the slipping or otherwise of said belt were caused by carelessness and negligence of said plaintiff and not by any fault, negligence, or lack of care of said defendant.

Wherefore defendant prays that it may go hence without day and have judgment for its costs.

McNAUGHT, FERRY, McNAUGHT & DUDLEY,
Attorneys for Defendant.

TERRITORY OF WASHINGTON, } *ss:*
County of King, }

T. J. Milner, being duly sworn, on oath says that he is the assistant superintendent of the defendant in the above-entitled action; that he has heard the foregoing answer read, knows the contents thereof, and believes the same to be true; that he makes this affidavit because —.

T. J. MILNER.

Subscribed and sworn to before me this 16th day of April, 1887.
JOSEPH F. McNAUGHT,
Notary Public in and for said County and Territory.

7 Endorsements: No. 5017. In the district court, 3d judicial district, holding terms at Seattle, Washington Territory. William C. Hawthorne, plaintiff, *vs.* C. & P. S. R. R. Co., defendant. Answer. Filed Apr. 18, 1887. James Seavey, clerk, by W. E.

Ledgerwood, deputy clerk. McNaught, Ferry, McNaught & Dudley, attorneys for def't. Received true copy of the within answer this 18th day of April, 1887. S., H. & McM., attorneys for pl't'f.

Demurrer to Answer.

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle, in King County, Washington Territory.

William C. Hawthorne, Plaintiff,
vs.
Columbia & Puget Sound Railroad Company, Defendant.

The plaintiff demurs to the affirmative defense of said defendant's answer herein, and, for cause of demurrer, says—

That the said affirmative defense does not state facts sufficient to constitute a defense.

STRUVE, HAINES & McMICKEN,
Attorneys for Pl't'f.

8 Endorsements: Received this 20th day of April, 1887, of Struve, Haines & McMicken, attorneys for the pl't'f in the cause mentioned in the foregoing demurrer, a true copy of said demurrer. McNaught & Co., attorneys for d'f'd't. No. 5017. In the district court, third judicial district, holding terms at Seattle. William C. Hawthorne, plaintiff, *vs.* Columbia & Puget Sound Railroad Company, defendant. Demurrer. Filed April 20, A. D. 1887. James Seavey, clerk, by W. E. Ledgerwood, deputy. Struve, Haines & McMicken, attorneys for pl't'f.

Reply.

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle, King County, in said Territory.

Willard C. Hawthorne, Plaintiff, *vs.* Columbia & Puget Sound Railroad Company, Defendants.	Reply to Defendant's Answer.

The plaintiff, by way of reply to the answer of defendant, says:

1st.

He denies each and every allegation contained in the 1st paragraph of the affirmative defense in said answer, except that at the time of the receiving of the injury therein referred to he was in the employment of the defendant and operating under its direction the trimmer mentioned therein.

2nd.

He denies each and every allegation contained in the 2nd paragraph of said affirmative defense.

9

3rd.

He denies each and every allegation contained in the 3rd paragraph of said affirmative defense.

4th.

He denies each and every allegation contained in the 4th paragraph of said affirmative defense, except that at all the times while he was running said trimmer it was his duty to oil the same once each and every day while the same was running.

5th.

He denies each and every allegation contained in the 5th paragraph of said affirmative defense.

And for an affirmative reply he says that he did at all times oil said trimmer at least three times each and every day while said trimmer was running up to the time of the receiving of the injury complained of, and did at all of said times keep said trimmer well oiled.

Wherefore he prays relief as prayed for in his complaint.

STRUVE, HAINES & McMICKEN,
Plaintiff's Attorneys.

TERRITORY OF WASHINGTON, }
County of King, } *ss:*

Willard C. Hawthorne, being first duly sworn, on oath says that he is the pl't'f in the above-entitled action; that he has heard the foregoing reply read, knows the contents thereof, and believes the same to be true.

WILLARD C. HAWTHORNE.

Subscribed and sworn to before me this 11th day of May, 1887.

W. M. GORHAM,
Notary Public in and for King Co., Washington Territory.

Endorsements: No. 5017. In the district court, third judicial district, holding terms at Seattle, W. T. Wm. C. Hawthorne, plaintiff, *vs.* C. & P. S. R. R. Co., defendant. Plaintiff's reply to def'd't's answer. Filed May 11, 1887. James Seavey, clerk, by W.
10 E. Ledgerwood, deputy clerk. Struve, Haines & McMicken, attorneys for pl't'ff. Service by copy admitted 11 day of May, 1887. M. N., F., McN. & D. attorneys for d'f't.

Journal M, page 557.

WEDNESDAY, *June 8th*, 1887.

* * * * * * *

WILLARD C. HAWTHORNE
vs.
COLUMBIA & PUGET SOUND RAILROAD COMPANY.
5017. Leave to Take Deposition.

This cause coming on for hearing on this 8th day of June, 1887, upon the motion of the plaintiff for leave to take the deposition of John O. Baker as a witness in said cause on the 13th day of June, 1887, commencing at the hour of ten o'clock in the forenoon of that day, at the residence of the said John O. Baker, on the west side of Third street between Marion street and Columbia street, in the city of Seattle, King county, Washington Territory, the court, being fully advised in the premises, grants said motion.

Journal N, p. 60.

MONDAY, *June 27th*, 1887.

* * * * * * *

W. C. HAWTHORNE
vs.
C. & P. S. R. R. Co.
5017. Order to Publish Deposition.

On motion of J. C. Haines, Esq., it is ordered by the court that the deposition of John D. Baker herein be published.

Page 94.

THURSDAY, *June 30th*, 1887.

W. C. HAWTHORNE
vs.
COLUMBIA AND PUGET SOUND RAILROAD COMPANY.
5017. Trial.

Comes now this 25th day of June, 1887, this cause for
11 trial; and a jury being called come and answer to their
names as follows: Ralph Clayton, Richard Jacobs, W. A. Scott, J. E. Bennett, A. M. Sawtelle, E. R. Boss, Edward Deal, J. Mills, E. C. Stonebraker, M. Costello, C. H. Ripley, J. H. Hummell, twelve good and lawful men, duly empannelled and sworn, and the cause proceeds by the examination of witnesses on the part of the plaintiff and the defendant, and, the evidence having closed, the trial proceeded by the argument of counsel for the plaintiff and defendant respectively, and, the argument having closed, the judge instructs the jury.

Whereupon the jury retires to deliberate in charge of a sworn officer.

And now, on this 30th day of June, 1887, come the jury into open court and, being called, answer to their names, all being present in the box, when, through their foreman, they return into court their verdict, in the words and figures following, to wit:

"In the District Court, Holding Terms at Seattle, W. T.

W. C. HAWTHORNE, Pl'ff,
vs.
THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Def't.

We, the jury in this action, find a verdict for the plaintiff, and assess his damages in the sum of ten thousand ($10,000) dollars.

J. H. HUMMELL, *Foreman.*"

Whereupon the jury are discharged from the cause.

The parties having so stipulated, it is ordered that the defendant have until the 14th day of July, 1887, within which to file its motion for a new trial, and that said defendant have until that time to except to such portions of the instructions as it may see fit, and that said exceptions, when made, shall be considered as having been made after the giving of said instructions and the retiring of the jury in said cause, and before the rendition of their verdict therein. And it is further ordered by the court that said motion for a new trial be, and the same is hereby, set for hearing on the 14th day of July, 1887, at the hour of 2 o'clock in the afternoon.

Page 536.

FRIDAY, *October* 21*st*, 1887.

* * * * * * *

W. C. HAWTHORNE
vs. 5017.
C. & P. S. R. R. Co.

This cause coming on for hearing on this 21st day of October, 1887, upon the motion of the defendant to vacate and set aside the judgment and verdict rendered and entered in said cause and to grant a new trial therein, the court, being fully advised in the premises, denies said motion; to which ruling of the court the defendant, by *his* counsel, excepts, and its exception is allowed.

And said cause coming on further to be heard on said 21st day of October, 1887, upon the plaintiff's motion for a judgment therein against the said defendant upon the verdict rendered in said cause, the court, being fully advised in the premises, grants said 12 motion. Wherefore it is ordered, considered, and adjudged by the court that the plaintiff, Willard C. Hawthorne, have and recover of and from the said defendant, The Columbia & Puget Sound Railroad Company, the sum of ten thousand dollars ($10,000), together with his, the said plaintiff's, costs and disbursements herein to be taxed, and that execution issue therefor.

Statement of Facts.

TERRITORY OF WASHINGTON,
County of King.

In the District Court of the Third Judicial District, Holding Terms at Seattle.

W. C. HAWTHORNE, Plaintiff,
vs.
THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Defendant.
Statement.

This cause comes on for trial before the court and a jury on the 27th day of June, 1887, the plaintiff appearing in person and by J. C. Haines, Esq., one of his attorneys, and the defendant also came by James McNaught, Esq., one of its attorneys, and thereupon, after the jury had been called and sworn to try the issue, evidence was introduced on the part of the plaintiff and defendant respectively. Objections thereto were made and ruled upon *the* the court, and exceptions to said ruling were taken and allowed by the court as follows, viz:

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle, King County.

W. C. HAWTHORNE, Plaintiff,
vs.
COLUMBIA & PUGET SOUND R. R. Co., Defendant.

Testimony Offered by Plaintiff.

WM. D. KOSLOWSKI, a witness on behalf of plaintiff, being duly sworn, testified as follows:

13 (By Mr. HAINES:)

Q. Where do you reside?
A. Seattle.
Q. How long have you resided here?
A. 17 years.
Q. What business have you been engaged in while residing here?
A. Mostly saw-mill.
Q. Are you acquainted with the saw-mill operated by the Columbia & Puget Sound Railroad Company where Mr. Hawthorne received the injuries that form the subject of this action?
A. Yes, sir.

Q. How long have you been acquainted with that mill?

A. Four years.

Q. What experience have you had in and about a saw-mill?

A. About twenty years.

Q. What kind of work?

A. All kinds of work.

Q. Are you acquainted with the operation of what is known as a trimmer?

A. Yes, sir.

Q. Did you ever see the trimmer in the saw-mill in question in this case?

A. Yes, sir.

Q. Do you know Mr. Hawthorn, the plaintiff in this case?

A. Slightly.

Q. Can you describe to the jury how that trimmer is constructed and was constructed at the time Mr. Hawthorne received the injury?

A. It was constructed very simply with a pulley—a belt run over two loose pulleys.

Q. Why do you call them pulleys?

A. The pulleys revolved over the shaft.

Q. Sort of wheel?

A. Yes, sir.

Q. What was thi*d* shaft made of?

A. I think it was made of gas pipe.

Q. How were the pulleys kept in place on this shaft?

A. I believe they were screwed on both ends with nuts.

Q. What kind of nuts were they?

A. All the same material—gas-pipe nuts.

Q. Are they round or square?

A. I don't remember whether round or not.

Q. How long since you have seen the trimmer?

A. I don't remember how long.

Q. About how long should you say?

A. Well—I don't understand what you mean.

Q. How long since you have seen that machine?

A. I saw it every day while I was there.

Q. Have you seen it since you left?

A. No, sir.

Q. Do you know whether this cap screws on the outside or inside of the pipe?

A. Outside.

Q. Do you know how it was screwed on?

A. No, sir.

Q. What position did you occupy in the mill while you worked there?

A. I had charge of the lumber and charge of the trimmer.

Q. Did you ever know of that pulley's falling?

A. Yes, sir.

Q. When?

A. I cannot remember when; but they nearly hurt me once.

Q. Where were you working?

A. I stood right there and directed the man how to trim it.

Q. Do you know what caused it to fall?

A. I don't know.

Q. Do you know whether the nut remained on or not?

14 A. Oh, no; the nut came off.

Q. Where did the pulley fall to?

A. Between me and the man.

Q. Do you know how much that pulley weighed?

A. I don't know; 40 to 50 pounds.

Q. How large a wheel was it?

A. About that large. (Witness indicated a diameter of about 12 inches with his hands.)

Q. How wide?

A. About like that (indicating about six inches with his hands).

Q. Made of iron?

A. Yes, sir.

Q. Do you know whether any of the officers or persons in authority around the mill at that time knew of the fall of this pulley?

Mr. McNaught: We object to the testimony. It should be confined to the present ownership of the saw-mill, so far as knowledge is concerned of the officers in charge at the time the accident occurred to the plaintiff. * * *

(After further argument by counsel for plaintiff and defendant the court said:)

The Court: The rule is quite familiar that the principal is chargeable with the acts and conduct of his agents in the scope of his agency and while employed as agent; but is there anything—but does the rule extend to the proposition that the principal is charged with something that the agent knew while not employed by the principal?

Mr. Haines: We contend that it does, your honor.

Mr. McNaught: We contend that it does not, your honor.

The Court: We will wait until we come to close of the testimony, and I will hear both of you on that subject.

Q. Were you in the employ, Mr. Koslowski, of the Columbia & Puget Sound Railroad Company?

A. Yes, sir.

Q. Where were you employed by them?

A. In the saw-mill.

Q. In what capacity?

A. Same capacity.

Q. As a sort of assistant foreman?

A. Yes.

Q. What were your duties in and about the mill?

A. To look after the lumber and machinery.

Q. Did you give any orders to the employees?

A. Yes, sir.

Q. Did you have anything to do with the operation of this trimmer?

A. Particularly.

Q. Did you operate the trimmer yourself, or under your orders?

A. Sometimes.

Q. Did this pulley fall before or after you entered the employ of the defendant in this case, The Columbia & Puget Sound Railroad Company?

A. Afterwards.

Q. Were you then in the mill?

A. Yes, sir.

Q. Were they operating the mill?

A. Yes, sir.

Q. Did you report the fall of this pulley to any one connected with the management of the mill?

15 Mr. McNaught: We object. It is not confined in time sufficiently definite so as to connect it with this case. Mr. Koslowski was in the employ of the Columbia & Puget Sound Railroad Company under another management, when there were different officers in charge at the time this plaintiff was injured. Our contention is that we are not chargeable with verbal communications or oral information that former employees had and carried away with them. If a written report was made and filed on our records we would be chargeable with it.

The Court: Your proposition is, then, that if a man as general manager of a railroad and as such receives oral knowledge of certain facts and he subsequently resigns or is removed and goes out and a new manager comes in that he is not chargeable with notice of that fact?

Mr. McNaught: He is not chargeable with notice of that fact.

(After further argument by Mr. McNaught the court said:)

The Court: The objection will be overruled and the witness will answer.

Mr. McNaught: We save an exception.

The Court: Note the exception.

(Question read to witness by reporter.)

A. Yes, sir.

Q. To who?

A. To the superintendent.

Q. What was his name?

A. Coleman.

Q. What did you report to Coleman? Give the substance of the information that you gave to Coleman.

Mr. McNaught: We make the same objection.

The Court: Note the same objection, same ruling, and exception.

A. I said the trimmer broke down.

Q. Did you tell him how it occurred?

A. I told him it broke down; to come and see it himself.

Q. Did he come and see it himself—did he examine the trimmer?

A. I suppose so.

Q. What was done in regard to repairing it?

A. Carried it to the machine shops and fixed it.

Q. What was done to it?

A. I don't know.

Q. Did you see the trimmer afterwards?

A. I saw it running afterwards.

Q. What, if any, change was there in the appearance of the trimmer after it was put back?

A. Not much change.

Q. Did you notice any change?

A. No.

Q. How about this nut? Was there any change in that?

A. I did not notice.

Q. Do you know Mr. Campbell, master mechanic of the mill?

16 A. Yes, sir.

Q. Was he employed there at the time you were?

A. Yes, sir.

Q. What position did he occupy at that time?

A. Master mechanic.

Q. Is he still in the employ of the defendant in this case?

A. Yes, sir.

Q. About the mill?

A. Yes, sir.

Q. What position does he occupy now?

A. The same.

Q. Do you know whether he was occupying that position when Hawthorne was injured, the 28th of October, 1885?

A. I think so.

Q. Do you know whether Campbell knew anything about the fall of the pulley?

A. Yes, sir.

Q. State what he knew in regard to it.

A. He fixed it.

Q. He is the man that fixed it?

A. Yes, sir.

Q. Who built that mill?

A. Mr. Colman.

Q. Did Campbell have anything to do with the building of it?

A. He put the machinery in.

Q. State whether there was or was not anything about this trimmer to show which way that cap turned when put on.

A. That I don't know; that I could not tell.

Q. You cannot tell? Was there anything you could see?

A. No, sir.

Q. Do you know how this machine was oiled?

A. I believe there was a couple of holes in the pulley that we put the pipe in to oil it.

Q. Where did the oil go to?

A. Between the shaft and the pulley.

Q. Do you know anything about the oil—whether the oil ran out or flew out of the pulley after being put in?

A. If you put in too much it would run out sometimes.

Q. Did you ever know any one to take any means to stop that? Did you ever do anything to stop the oil?

A. Sometimes put a little wooden plug in it.

Cross-examination.

(By Mr. McNaught:)

Q. Are you a machinist?

A. No, sir.

Q. Are you a mechanic?

A. No, sir.

Q. Your business around the mill there was a kind of a roustabout, was it not?

A. Yes; sometimes.

Q. Doing a little of everything?

A. Yes, sir.

Q. Making yourself a convenient man generally?

A. Yes, sir.

Q. You have worked in repairing machinery?

A. No, sir.

Q. You say that Mr. Colman was the superintendent of this mill and constructed the mill?

A. Yes, sir.

Q. Was not Mr. Colman owner of the mill also?

A. Yes, sir.

Q. Did you have an interest in that mill also?

A. Slight interest.

Q. In what year was it that that pulley you have referred to fell?

A. I think between 1879 and 1883.

Q. When did you last work in and about that mill—how many years ago?

A. I am not certain whether in 1883 or 1884; I think in 1884.

17 Q. Then all the testimony in this case that you have given applies to facts occurring prior to that time?

A. Yes, sir.

Q. Did you look after the machinery in this mill at any time when employed?

A. Yes; I looked after that trimmer.

Q. For what length of time?

A. As long as I was there; between three and four years.

Q. What did you do about looking after it?

A. I seen that it was oiled.

Q. Did you run the trimmer yourself?

A. Sometimes.

Q. When you were not running it who run it?

A. Oh, Chinamen or some other men.

Q. That was three or four years or five years ago?

A. Yes, sir.

Q. During that time that you were about the mill, all the time during that three or four years, you were there steadily?

A. Yes, sir.
Q. What year was that mill constructed in?
A. In 1879.
Q. Trimmer constructed at that time?
A. Yes, sir.
Q. Been in position ever since?
A. Yes, sir.

A. L. SPENCER, a witness called on behalf of the plaintiff, being duly sworn, testified as follows:

(By Mr. HAINES:)

Q. Where do you reside?
A. Seattle.
Q. How long have you resided here?
A. More or less for 18 years; nearly 18 years.
Q. What is your business at present, Mr. Spencer?
A. Sawmilling.
Q. What saw-mill are you working in?
A. Columbia & Puget Sound Railroad Company.
Q. The same saw-mill that this accident is said to have occurred in?
A. Yes, sir.
Q. You saw the accident occur, did you not?
A. I did.
Q. How long have you been working about machinery?
A. 22 years.
Q. How much of the time in saw-mills?
A. 22 years.
Q. With what branch of the operation of saw-mills have you become familiar or with the machinery?
A. I have run planers for the last 18 years.
Q. What other machines have you run in saw-mills?
A. All kinds of machinery in saw-mills.
Q. Ever run a trimmer?
A. I have.
Q. How long have you worked in this mill?
A. Nearly six years.
Q. Continuously?
A. Yes, sir.
Q. And are working there now?
A. Yes, sir.
Q. What machine have you been running during that time?
A. The planing machine.
Q. Are you acquainted with Willard C. Hawthorne, the plaintiff in this case?
A. I am.
Q. How long have you known him?
18 A. Well, I have known him for five or six years, but not very intimately acquainted with him.

Q. Were you employed in the saw-mill at the time this accident occurred?

A. I was.

Q. What kind of a man physically was Hawthorne prior to the accident? What sort of a man as regards health and strength apparently?

A. Well, I judged him to be a pretty good sort of a man.

Mr. McNaught: I believe I will object to that, if your honor please. I do not recollect any allegation as to the condition of plaintiff as to health or strength prior to this accident in the complaint. In order to prove that fact they must aver it. It must be put in issue.

The Court: I think the evidence is admissible. The objection is overruled and an exception allowed.

Q. Now, in regard to his ability to work. Are you familiar with the kind of work he did there and the manner in which it was performed?

Mr. McNaught: We make the same objection.

The Court: The same ruling and exception will be noted.

A. Yes, sir.

—. State what his ability was in that regard as compared to average men who were employed with him.

A. I should think his ability was rather more than the average of the common run of men.

Q. What was he first employed at when he first entered the service of the mill? Do you know?

A. He was running a slab car, I believe.

Q. Do you know how long he had been running the trimmer when this accident occurred?

A. I think about two weeks.

Q. How far from the place where Mr. Hawthorne was injured were you working when the accident occurred?

A. I was at that time when the accident occurred about 30 feet; probably 25 to 30 feet.

Q. I wish, Mr. Spencer, you would describe this trimmer to the jury—how it was constructed—in your own way.

A. I don't know that I could, exactly. The trimmer was a hanging trimmer, hung overhead by a shaft hanging on some posts or beams, and the beam and saw swung out across a table where they run the lumber across to cut it up and trim it. The belt ran up on each side of the trimmer, then run diagonally across to the shaft that drove the trimmer. There was a shaft directly across the top of the trimmer. Say that was the trimmer (indicating with his hands) and say that was the shaft across there. There was a pulley on each end and a belt run over and down around underneath the saw to drive the saw.

Q. How was it operated—how was it superintended? Tell the jury how that was effected—how it was done.

A. There was a handle to hold the saw with—saw frame—and you pulled it back and forth.

19 Q. And was this shaft on which these pulleys run so that it was perfectly horizontal all the time?

A. No; when you pulled the shaft forward the shaft that the pulleys run on went with the trimmer—went with the frame of the trimmer. There was a pulley down on one side and then on the other.

Q. Q. About how large were these pulleys?

A. I think about 12 inches in diameter.

Q. And about how wide was the rim of the wheel that the belt passed over?

A. It was about ten inches.

Q. About what, in your judgment, did these pulleys weigh?

A. I think about sixty pounds.

Q. What sort of *of* shaft were they on?

A. They were on a piece of gas pipe.

Q. How were the pulleys held on the shaft?

A. By a nut screwed on the outside of the gas pipe.

Q. Describe that nut to the jury.

A. Well, I never took notice of the nut particularly. I have seen the shaft off, seen the thread on the gas pipe, but never examined it closely.

Q. Do you remember whether it was round or square?

A. I think it was round.

Q. Do you know how it was put on; did you ever see it put on?

A. I never saw it put on.

Q. Was there anything but this nut to hold the pulley on?

A. Not to my knowledge.

Q. Did you ever see a trimmer like this that you know of?

A. I never saw one with a piece of gas pipe for a shaft.

Q. Do you know which way the nut turned?

A. I could not swear.

Q. Suppose the nut turned in such a way, Mr. Spencer, that when the pulley ran the way it usually did—the pulley always ran one way—and there was any friction between the nut and pulley, that the nut would screw off—whether you would consider that a safe machine.

A. If the nut screwed on the same way the pulley ran I would not judge there was a chance to come off; but if it ran the other way I should judge there was.

Q. Do you know how nuts on machinery generally are put on wheels or anything revolving; how they usually turn; whether there is any rule in regard to it?

A. They do not put them on to run the same way the pulley does.

Q. What is the object of putting them on in that way?

A. I suppose to keep them on.

Q. State whether you ever, to your recollection, saw a nut turning that way on heavy machinery like this.

A. I never did.

Q. Suppose that this nut was arranged so as to turn off the way the pulley run, whether anything could have been done further than putting a nut there itself to keep it on, supposing this nut turned that way.

A. I think if the nut was properly put on and if it had plenty of oil there was no danger of it coming off if it did run that way.

Q. How is that?

A. If the nut run in the opposite direction and had been properly put on and had plenty of oil I don't think there would have been any need of its coming off. There was no occasion for anything of that kind to happen if it had plenty of oil, if it had not some cause for rubbing together.

Q. Suppose the babbett metal was gone between the wheel and the nut.

A. If the babbett metal was gone and it had plenty of oil it would not make any difference.

Q. Could anything have been done in the way of putting a bolt through the shaft and staying it in that way?

A. There had not been anything done.

Q. Would that have made any difference?

A. If there had been a bolt put through it would have held it on.

Q. Do you know whether there has been any change made in that machinery or not since the accident?

Mr. McNaught: We object to that. The rule is well understood, and as your honor has already given it in other cases, that a person is not bound to furnish the best-known machinery, but to furnish machinery reasonably safe. It is not a question as to what we have done with the machinery in the last few years or months since the accident occurred, but what was the condition then.

The Court: The rule is quite well settled, I think, Mr. McNaught, that where an accident occurs through defective machinery or defective fixtures or the machine itself, if that is shown to be true, then a change, repair, or substitution of something else for the defective machinery is admissable as showing or tending to show the fact. I think that is quite well settled.

Mr. McNaught: I thoroughly concur with the court as to the rule.

Mr. Haines: We propose to show changes.

The Court: I think it is admissable.

Mr. McNaught: We will save an exception.

The Court: Exception allowed.

A. There has been some change made since the accident.

Q. What changes?

A. There was a rod of iron put through the shaft and the gammon nuts on the end of the rod to keep the pulleys on.

Q. If that had been there before or on the day that Mr. Hawthorne was injured state what, in your opinion, effect it would have had in regard to keeping the pulley on.

Mr. McNaught: We make the same objection.
The Court: The same ruling and exception.

Q. What effect would it have toward keeping the pulley on?

A. I think it would have kept the pulley on.

Q. Has anything been done in regard to guarding or protecting the person working at the trimmer in that machine since then?

21 Mr. McNaught: The same objection.
The Court: The same ruling.

A. There is.

Q. What is it?

A. There has been some plank put up underneath the pulleys to keep the pulleys from falling down.

Q. If that had been there at the time that Mr. Hawthorne received the injury what effect would it have had?

Q. He probably would not have been hit with the pulley at all.

Q. Did you see the accident?

A. I did.

Q. I wish you would describe to the jury what you saw.

A. I was standing about 25 or 30 feet over at the emery wheel grinding some knives, and I took one of the knives up to look across the edge, across to the light, to see if the edge was straight, and just as I was looking across I saw the pulley come down and I saw Mr. Hawthorne shove the trimmer back and the pulley broke from overhead, and I saw it catch him on the head, saw the pulley hit him on the head. The pulley was canted a little at the time it came down, and when he shoved the trimmer back a little the shaft overhead leaned down a little ways and the nut and pulley came off both at the same time; the pulley hit him and knocked him down senseless on the floor, and Mr. Myers and two or three other *other* men picked him up and carried him into the office.

Q. Did you see the nut?

A. I saw the nut falling at the time.

Q. Do you know which direction it fell?

A. I think it went off toward the side of the mill. I think it struck about six or eight feet from where he was standing.

Q. Did you ever know that pulley to come off before?

A. Yes, sir.

Q. Was it while you were employed in the mill?

A. Yes, sir.

Q. Who was operating the mill during the time that you saw it come off?

A. The present company, I think.

Q. How many times did you see it come off?

A. I think I seen the pulley come off four times in six years. I could not say whether it came off once when Colman had charge of it or not.

Q. What was the cause of its coming off in these several instances?

A. The nut got loose and rattled off.

Q. State how the fall of the pulley before compared with its fall at the time of the injury to Hawthorne—whether it was the same cause or not.

A. I judge it was about the same cause.

Q. Do you know whether the falling of the pulley on these previous occasions was reported to any person that had anything to do with the management of the mill?

A. I do not.

Q. Do you know the gentleman named Campbell?

A. I do, sir.

Q. What position did he occupy there in the mill during the time or at the time this pulley fell off?

22 A. He was master mechanic, or has been.

Q. Do you know whether he knew anything about its falling off?

A. I think he sent his man in and had it put on—fixed.

Q. Who had charge of these matters during the time that you worked in the mill—as far as the machinery broken or anything broke down was concerned? Who had charge of it?

A. Mr. Campbell.

Q. Is Campbell in the employ of the company at the present time?

A. Yes, sir.

Q. In what capacity?

A. Master mechanic.

Q. What is the size of this shaft?

A. I think it is about 2½-inch pipe.

Q. In estimating the size to be 2½ do you mean around?

A. 2½ across.

Cross-examination of Spencer:

(By Mr. McNaught:)

Q. How far, Mr. Spencer, is the planer you have operated these number of years located from the trimmer in question?

A. About 10 feet.

Q. How many years have you been operating that planer?

A. Six years.

Q. Six years?

A. Nearly 6 years.

Mr. Haines: There is one question I omitted to ask the witness that I would like to ask him. About how far did that pulley fall before it struck Mr. Hawthorne?

The Court: I think there is no question upon the pleadings upon that point. You allege 8 feet and they allege 8 feet.

Mr. Haines: Very well; if that is understood I will not ask the question.

The Court: I may be wrong about it.

Mr. McNaught: I think that is right.

Mr. Haines: I think your honor is correct about it.

(By Mr. McNaught:)

Q. Then during that 6 years you have been familiar with the condition in which this trimmer was and the planer and the operation of the machinery about the mill?

A. How is that?

Q. During that 6 years, I say, you have been ordinarily familiar with this trimmer and the planer and the machinery about you?

A. Yes, sir; I was familiar with it.

Q. You say that the planer was located 10 feet distant. In what direction, now, was the trimmer?

A. Right exactly opposite the trimmer.

Q. North?

A. East.

Q. In your position, working at the planer, can you see the person who is opposite the trimmer?

A. Yes, sir.

Q. In your position working at the planer can you see the pulleys and principal parts of the machinery of the trimmer as it was at the time of the accident?

A. Yes, sir; when working around the planer I can.

23 Q. A person managing the trimmer, running the trimmer at and prior to the time of this accident, could such a person see these pulleys and the nuts that you have mentioned from his position working, using, and running the trimmer?

A. He could see them by looking up.

Q. Looking up?

A. Yes, sir.

Q. Mr. Hawthorne had been running this trimmer about two weeks prior to the time of the accident. Now, during that time what, if anything, occurred to this trimmer?

A. I could not swear that anything occurred to it during that two weeks.

Q. Do you know whether or not either of the pulleys were off during that time connected with this trimmer?

A. I couldn't swear to it—whether they were off or on I could not swear.

Q. What is your best recollection about it?

A. I don't know whether they were off or not. I had heard it said that one of them was off the day before—either the day or the day before—the one on the opposite side, but I could not swear to it.

Mr. Haines: I move to strike out what the witness says he heard.

The Court: That is not legitimate, of course. You may strike it out, Mr. Wood.

(By Mr. McNaught:)

Q. Did you hear anything said concerning that from Mr. Hawthorne himself?

A. No, sir; I did not.

Q. Do you know from any conversation that you had with Mr. Hawthorne whether he knew anything about the condition that the pulleys and machinery was in prior to the accident?

A. I think he knew that it was in rather bad condition.

Q. Why do you think he knew it?

A. Well, he had been told in the morning that it was in bad condition. I also told him in the forenoon——

Q. Of the day of the accident?

A. Of the accident; that I stepped over from the planer where I was and told him he had better look out for himself; that the pulley was liable to come down and he might get hurt.

Q. Why did you tell him that?

A. Well, I didn't want to see the man get hurt.

Q. Was there anything at that time that attracted your attention to the pulley?

A. Yes; there was. The shaft of the pulleys shook considerable, and I was under the impression that something was going to happen—the pulleys would come down or the shaft would come down—the whole rig.

Q. Could you see that they were shaking more than ordinary from where you were standing?

A. Well, I don't know that I could say that they were shaking (pauses); yes; they were shaking more than (interrupted)——

Q. More than ordinary?

A. More that morning than they generally did.

24 Q. More that morning than ordinary?

A. Yes, sir.

Q. Was there anything in the rattle or noise that the pulleys were making that attracted your attention to them that morning?

A. Nothing more than usual; nothing more than usual.

Q. Well, you say that his attention that morning had been attracted to the condition of the pulleys. By whom was that done?

A. By Mr. Smith, the sawyer.

Q. When was that—before they commenced work in the morning?

A. I couldn't tell you. I think it was.

Mr. Haines: Do I understand the witness as testifying to what he heard himself?

(By Mr. McNaught:)

Q. Were you there at that time?

A. I was. I didn't hear Mr. Smith tell Mr. Hawthorne about it at all. Only what I told him myself, that is all I could swear to.

Q. What did Mr. Hawthorne say or do when you attracted his attention to the dangerous condition of the machinery—the trimmer in question—what did he do or say?

A. I think he said, "All right; I will look out the best I can."

(By Mr. Haines:)

Q. What?

A. I think he says, "All right; I will look out the best I can—do the best I can."

(By Mr. McNaught:)

Q. How long was that before the accident occurred, that you gave him that notice or called his attention to the condition of the machinery?

A. Somewheres in the neighborhood of an hour or an hour and a half or two hours. I could not tell exactly; probably an hour and a half.

Q. Did he continue to operate the machine from that time to the time of the accident?

A. He did.

Q. What, if anything, from the time you gave him the notice to the time of the accident, did he do toward having it repaired or giving notice of its dangerous condition?

A. I couldn't say that he gave any notice at all.

Q. He continued to work right there at the same place all the time?

A. Yes, sir.

Q. You say, Mr. Spencer, that the pipe or rod is a piece of gas pipe, and that you never saw a piece of gas pipe used in a trimmer before?

A. No, sir; I never saw a piece of gas pipe used that way before.

Q. You also say that if the machinery had been kept well oiled and looked after, that on account of its being gas pipe or being a right-hand thread wouldn't have caused the accident or made it (interrupted)——

A. It might have caused it; but I don't see (interrupted)——

Q. You don't think it would?

A. In my mind, if there was plenty of oil on the axle of the pulley it would have run on the shaft until it wore it entirely out. If it had oil, I know it would.

25 Q. Did you examine this pulley and nut after the accident occurred, so as to see whether it had been properly kept oiled or not?

A. I did not examine it for that purpose. I simply looked at it at the time.

Q. Well, what was your conclusion at that time as to its having (interrupted)——

A. Well, I don't recollect what my conclusion was at that time. The pulley was picked up and laid on a stick of timber that laid on the rollers or some plank, and the nut was also picked up and laid there. Mr. Milner and Mr. Campbell were standing there by the pulley and nut. I picked Mr. Hawthorne's hat up and laid it alongside the pulley and showed it to Mr. Campbell and Mr. Milner, where he was struck on the head by the pulley. I noticed on one side of the nut there was some specks of babbett—on the inside of the nut, the side that run next to the pulley.

Q. Did you notice whether there was anything wrong with the babbett inside of the pulley at that time?

A. I did not.
Q. You did not look to see?
A. I didn't look to see.
Q. Now, Mr. Spencer, could the babbett have gotten onto the inside of that nut, where you saw it?
A. Well, it probably got hot and run out.
Q. That is, the babbett in the pulley got hot and run out so as to come into contact with the nut?
A. Yes, sir; it couldn't get out any other way.
Q. It couldn't get out any other way. Then the conclusions you come to was that the pulley had not been kept oiled, so that the babbett had melted, and a portion was sticking on the nut when you saw it immediately after the accident?
A. I could not say as I came to any conclusion about it at that time.
Q. Well, what is your conclusion now about it, from what you saw at that time?

Mr. Haines: If your honor please, we object to his stating his conclusions. Let him state the fact.
The Court: He asks the opinion of the witness, Mr. Haines.

A. My opinion is that it was out of order, and because the babbett melted or had been melted; perhaps the day before or a day or two before, and the shaking of the pulley had caused the nut to come off and let the pulley down.
Q. Well, what would be the cause? Wouldn't the fact of neglecting to oil it be the cause—the principal cause—of the melting of the babbett?
A. Yes; that would be the cause of it.
Q. That would be the cause?
A. Yes, sir; not having oil.
Q. Now, whose duty was it to oil it?

Mr. Haines: We object, if your honor please. That is a matter of defense, and it is not cross-examination.
Mr. McNaught: It is admitted by the pleadings. I forgot that. It is admitted that it was Mr. Hawthorne's duty to oil it.
Mr. Haines: We admit it was Mr. Hawthorne's duty to oil the pulley.
26 The Court: There is no issue upon that.

(By Mr. McNaught:)

Q. Now, did you notice that nut, Mr. Spencer, at that time to see whether there was any oil on it or not, so as to say as a fact that it was not dry?
A. The nut on the inside appeared to be rather dry then from where the pulley had been rubbing against it.

The Court: The nut appeared that way, as I understand you?
A. The tap.

(By Mr. McNaught :)

Q. You continued to work yourself in the mill from the time you called Mr. Hawthorn's attention to the condition of the trimmer until the time of the accident?

A. Yes, sir ; I was (interrupted)——

Q. And at the time of the accident was some 30 feet from Mr. Hawthorne?

A. Yes, sir.

Q. You were not running the planer, then, at the time of the accident?

A. Not at the exact time.

Q. You say that you saw the nut flying—in what direction?

A. It flew off towards the side of the mill.

Q. South?

A. South and west ; more in a westerly direction.

Q. How long was it prior to the time the accident occurred that the pulley—this pulley—came off last time?

A. I could not say how long it was.

Q. But it was off four times altogether in 6 years?

A. Yes; I think four times. I recollect seeing it come off four times.

Q. In 6 years?

A. In the 6 years to that time.

Q. And during any of those times did you examine the pulley or the nut or any portion of the machinery so as to ascertain the cause of its coming off?

A. No, sir ; I did not.

Q. You say that you have no knowledge during this time of the fact of this pulley coming off having been directed to the attention of any of the foremen or superintendents of the company?

A. I have no knowledge of it myself.

Q. Since the accident you say that some planks have been put up. Are they so constructed as to be under the pulleys?

A. Yes, sir.

Q. And prevent your now seeing the pulleys as plainly and the machinery over as plainly as you could have done before the planks were constructed or put in the position they are now in?

A. Yes. It prevents your looking at them. You can't see them quite as plain. There is just a little hole right where the belt runs through.

Q. You say that Mr. Hawthorne was working at some general work prior to taking charge of this machinery. Do you know how he came to have charge of this machine?

A. I do not. I don't know why he happened to have charge of the trimmer at that time.

Q. In running the trimmer, now what was his duty in relation to the machinery connected with it?

Mr. Haines : We object to that. That is a matter of law. We haven't asked anything in regard to that. That would depend en-

tirely upon his employment—his contract with the com-
27 pany—what his duty was. It would be a matter to be ascer-
tained after the court hears the evidence in the case.

The Court: Am I mistaken in supposing that the pleadings settled that question?

Mr. Haines: No; there is some little dispute in regard to the extent of his obligations there.

(Discussion. Examination of the pleadings by the court.)

The Court: Your only objection is that it is an affirmative defense and not cross-examination?

Mr. Haines: There is a further objection. He is asked, in regard to duty—when that duty can be ascertained only when we know what his employment was—what he was hired to do. His duty would depend entirely on his contract with the company. That would be a matter of law arising from the facts connected with his employment.

The Court: (Examines the pleadings.) It might be obnoxious to the objection that it is affirmative matter upon your side, Mr. McNaught, and not cross-examination. That is not insisted upon.

Mr. Haines: I wish to urge that objection.

Mr. McNaught: I will waive it at this time. Take the witness.

Redirect examination.

By Mr. Haines:

Q. Mr. Spencer, did you tell Mr. Hawthorne what you considered to be the matter with this trimmer at the time you say you told him that you thought it was lianle to come down?

A. What was the matter with it? I didn't know myself, because I just merely stepped over near by the planer and told him to look out for himself, that the pulley was liable to come down.

Q. You didn't tell him that you thought he had batter not work there any longer?

A. No, sir.

Q. You had no superintendence over Mr. Hawthorne?

A. No, sir.

Q. You were merely running the planer?

A. That is all.

Q. And he was employed running the trimmer?

A. Yes, sir.

Q. Did you ever say anything to him about oiling the pulley?

A. No, sir.

Q. The shaft and the pulley simply shook so as to attract your attention?

A. It attracted my attention to it.

Q. What time of day was that?

A. I could not say what time of day it was I told him this.

Q. How long after he came to work?

A. I could not say how long it was.

Q. How long should you judge that would be; your best recollection about that?

A. Well, I don't know that I could say exactly how long it was
after he went to work because I don't recollect what time we
went to work—whether it was 7 o'clock or 8 o'clock in the morning.
I know we was quite busy at that time. I recollect of
being at the side of the planing machine, and I looked over and saw
the pulley was shaking pretty bad, and then I went to the
28 back part of the machine, where he was feeding the lumber
in—Mr. Hawthorne was there working, within about 10 feet
from me—as soon as I started the planer I just stepped over near
Mr. Hawthorne and says: "Hawthorne, look out for the pulley; it is
in bad condition."

Q. That is all you said to him?

A. That is all I told him. It was somewheres about an hour or an hour and a half before the accident.

Q. Have you any idea of what time of day it was?

A. What?

Q. Have you any idea of the time of day it was?

A. I think it was about half past nine. It was about half past 8, I think, when I told him that; the accident happened, I think, about half past 9.

Q. You had been at work some little time before you told him, hadn't you?

A. Yes, sir.

Q. Do you know how long you had been at work—how long you had been at work there, Mr. Spencer?

A. Had I been at work there?

Q. That morning. What length of time?

A. Ever since the mill started that morning. I don't recollect whether it started at 7 o'clock or 8 o'clock.

Q. In regard to oiling the machine, do you know how that machine is oiled—how the oil gets to the shaft?

A. There is a hole through the cap. Inside this is filled with oakum or waste. The oil goes through the cap into the oakum, and then there is some little holes in the pipe for the oil to run out onto the loose pulley.

Q. The only way the oil is supplied to the loose pulley is through these holes in the shaft?

A. Yes; but they generally pour oil between the pulley and the cap at the same time they will oil in the end of the nut. In the end of the cap they have got a plug in it.

Q. Oil put in that way will soon run out, won't it?

A. No; That does not run out so quick as if you put it between the cap and the pulley.

Q. That is what I mean to say—the oil put in between the cap and the pulley would soon run out?

A. I don't know as it would run out if it got in any quicker than the other, but it doesn't have so good a chance to get into the inside of the pulley as it does to put it in the other way.

Q. The object of putting oil in the shaft is to keep a constant supply of oil there, isn't it?

A. Yes, sir.

Q. Through these holes, that is the method that is usually relied upon to oil the pulley—through the end of the cap?

A. Yes.

Q. How large are these holes through which the oil is fed onto the shaft?

A. What?

Q. How large are these holes in the shaft?

A. I think about perhaps three-sixteenths of an inch.

Q. If those holes in any way should be filled up, then of course it would decrease the supply of oil to the shaft very much, wouldn't it?

A. Yes, sir; it would.

Q. The only way you could tell that would be by taking off the pulley and examining the shaft, wouldn't it?

A. Yes.

29 Q. In regard to oil being on there, do I understand you to say here, or did you say, rather, Mr. Spencer, that if there was oil on there, then, although the nut turned off as the pulley turned ahead, that the oil would prevent the nut turning off?

A. Yes, sir; I think that would prevent the nut from coming off, if it had oil. It was the shaking. If it had been dry it would have caused the two pieces of casting to cut; therefore if it had any chance to go it would have gone; the cap would have gone. If the oil had been between the cap and the pulley, why, the oil would have prevented the nut from coming off.

Q. If there had been oil enough to prevent friction?

A. I could not say whether there was any oil, or whether there was enough, or what.

Q. And so, if there had been, your idea is, if there had been enough oil (interrupted)——

A. That would naturally prevent the cap from coming off.

Q. But even with oil there would be some friction?

A. What?

Q. There would be some friction even with oil about there?

A. Yes—oh, no; I don't know that there would be any friction; just to keep the pulley on; that is all. There would be no friction about it at all.

Q. You don't think there would be any friction at all?

A. Not any at all.

Q. But if there was any friction at all it would tend, of course, to work the cap off?

A. Yes.

Q. Now, in regard to this babbett metal, I wish you would explain to the jury where that is—whereabouts this babbett is placed. You say you saw some pieces on the nut?

A. The pulley has a hob, the same as the hub of a wagon or buggy, and the inside of this is babbitted. There is, perhaps, a quarter of an inch of babbitt all around (interrupted)——

Q. Just explain to the jury; probably some of them do not understand that; some do and some do not.

A. In this pulley there is a place where the shaft goes through, and there is babbitt put on the outside because machinery runs better in babbitt than it does in iron, and that babbitt is run on the inside of this pulley to prevent it from wearing the shaft; from wearing the shaft or pulley.

(By a JUROR:)

Q. The hole in the pulley is larger than the shaft and the babbitt is put in to make the pulley fit the shaft?

A. The hole is larger than the shaft in order to get the babbitt in; probably half an inch.

(By HAINES:)

Q. How often is that babbitt put in?

A. Well, I think on an average perhaps once in three or four months during the time since the mill has been built.

Q. And when the babbitt is worn the pulley shakes?

A. When the babbitt is worn the pulley shakes.

Q. In regard to the melting of the babbitt, did you say that you thought the babbitt had melted?

A. I think part of the babbitt had been melted out the day before, or a day or two before. If the babbitt hadn't been—hadn't been worn off the pulley wouldn't have shaken.

Q. That was the cause of the shaking?

30 A. That was the cause of the shaking, it being loose on the shaft, and, having more play, it shook more.

Q. Q. Would the shaking of the pulley have any tendency to turn the nut off?

A. I don't think it would, the pulley—that is, just the shaking of it.

Q. That is all you noticed that morning, the shaking of the pulley?

A. That is all; that is all I noticed.

Q. Now, if the holes in the shaft had been stopped by anything—if anything had worked into those holes so that the oil hadn't got out through these holes in the shaft, what effect would that have on the babbitt?

A. Well, if the oil couldn't get through, it would cause the babbitt to run out—that is, if it had run long enough to get dry.

Q. If those holes were stopped it would make no difference how much oil a person put inside of the shaft, so far as oiling the shaft is concerned?

A. If the holes were stopped up it wouldn't go down, the oil being put on the end of the shaft.

Q. In regard to putting oil between the pulley and the nut, did the pulley bear against the nut?

A. Yes; the pulley runs against the nut.

Q. It would be somewhat difficult to get oil down between there, wouldn't it?

A. No; I don't think it is very difficult to get oil down, for there is probably a quarter of an inch play.

Q. But when the machine is oiled the saw is pushed back, isn't it?

A. When the machine is oiled the saw is pulled out in front, and that gives the shaft, say, in about that direction (illustrating), and pour the oil on top here between the cap and the pulley, and it runs onto the shaft.

Q. Then when the saw goes back the pulley slides down against the nut?

A. Yes.

Q. Its own weight would cause it to slide down?

A. Yes, sir.

Q. And the oil would run right down?

A. Yes.

Mr. HAINES: That is all.

Second cross-examination.

(By Mr. MCNAUGHT:)

Q. Mr. Spencer, you say that they used oakum in the gas-pipe as a kind of reservoir to hold the oil. Was that oakum or wool?

A. I could not say whether it was oakum or worsted.

Q. You don't know what kind of material it was they used?

A. No, sir; they generally filled it with some kind of waste—we call it waste—something of that kind about the machinery, put in boxes of that kind.

Q. Used for that purpose?

A. Yes, sir.

Mr. MCNAUGHT: That is all.

31 A. P. SPAULDING called as a witness for the plaintiff and duly sworn.

(By Mr. HAINES:)

Q. Where do you reside, Mr. Spaulding?

A. In Seattle.

Q. Your name?

A. A. P. Spaulding.

Q. How long have you lived in Seattle, Captain?

A. Eight years.

Q. What is your business at present?

A. Steamboating.

Q. Have you ever been enga-ed about saw-mills?

A. Yes, sir.

Q. For how long?

A. Six years.

Q. In what capacity?

A. All capacities.

Q. Are you familiar with the machinery of saw-mills?

A. Yes, sir.

Q. Do you know this saw-mill where Mr. Hawthorne was hurt, that has been referred to in the evidence?

A. Yes, sir.

Q. Did you ever have anything to do with that saw-mill?

A. Yes, sir.

Q. In what capacity?

A. In all capacities.

Q. During what years were you employed there?

A. From '79 until two years ago next July.

Q. Were you ever in the employ of the Columbia and Puget Sound R. R. Co. in that saw-mill?

A. Yes, sir.

Q. How long, about?

A. Six years; five or six years.

Q. Did you ever occupy the position of for-man in that mill?

A. Yes, sir.

Q. For how long?

A. I think three years. I think nearly three years.

Q. Did you have anything to do with building the mill?

A. Yes, sir.

Q. What did you have to do with building it?

A. I worked on the mill from the driving of the foundation till it was completed.

Q. Do you know anything about this trimmer where the accident occurred?

A. Yes, sir.

Q. Who put up that trimmer?

A. Mr. Colman.

Q. Can you describe that trimmer to the jury?

A. Well, yes. The trimmer was the same as all trimmers in the frame. The shaft that carries the pulleys went through the top of the frame of the trimmer, and a pulley on each end of the shaft, and a nut on each end of the shaft.

Q. This shaft that was in there, what was it made of?

A. Gas-pipe.

Q. Can you describe the nut that was put on the end of the shaft?

A. It was a cap.

Q. Round or square?

A. Round.

Q. How was that put on?

A. It was — on with a thread.

Q. Did you ever have anything to do with putting it on?

A. Yes, sir,

Q. How often have you put that on?

A. I have put it on sometimes as often as — three weeks. Once or twice, I believe, we babbitted it in three weeks; sometimes it ran two or three months.

Q. Sometimes the babbitt ran out in two or three weeks?

A. Yes, sir; I have known it to run out the next day after it was put in.

32 Q. How did you put the cap on?

A. With pipe tongs.

Q. How large are they?

A. I guess sufficient room to put a cap on a two-inch pipe.

Q. How long are they?

A. The handles would be probably two feet and a half or three feet long.

Q. Do you know which was the thread was?

A. Right hand.

Q. Right hand?

A. Right-hand thread.

Q. In which direction did the pulley run, with re*g*erence to this thread?

A. Left-handed.

Q. What would be the effect, suppose that the pulley bore on the nut sufficiently strong to cause friction?

A. Turn it off, I suppose.

Q. State whether that is the usual way of putting nuts on in positions of that kind for keeping pulleys on when they are revolving.

A. It was the only way it could have been in that case, because it is the only way threads are cut on gas pipe.

Q. Was this the same thread that was used on the gas pipe?

A. Certainly—yes, sir.

Q. How should it be put on? What is the proper and usual method of cutting that thread?

A. On gas pipe?

Q. No; on a trimmer shaft.

A. The opposite way.

Q. The opposite way. Did you ever see a trimmer like that before?

A. Oh, not necessarily, because a washer could be put on in — the hub of the arrangement that was turning and the nut to prevent friction.

Q. But is there any advantage, where they don't use gas pipe where the thread is already cut, in having the thread turned right-handed?

A. Any advantage?

Q. Any advantage; yes. Is there anything to be gained by cutting the thread right-handed instead of left-handed?

A. The machines are left-handed machines for cutting gas pipe.

Q. Suppose you were building a trimmer and didn't have to use gas pipe for the purpose of constructing the shaft, which way would be best?

A. I should cut it left-handed.

Q. Would there be any advantage in cutting it right-handed?

A. No, sir; not when you have the appliances for cutting it left-handed.

Q. In saw-mills, how are the threads usually cut in positions of that kind if there is any turning in it?

A. Generally the opposite way from what the pulley is turned.

Q. What is the purpose of that?

A. To keep the nut on, or whatever holds the pulley on—whatever you wish to hold on.

Q. Did you ever see this pulley fall?

A. I don't think I ever saw it fall—no, sir.

Q. Did you ever know of its having fallen?

A. Yes, sir.

Q. Was that while the present company was running the mill?

A. Yes, sir.

Q. Do you know the cause of its falling?

A. I presume it must have been caused by the babbitt's running out. It was always considered safe enough when the babbitt was in proper shape in the pulley.

33 (Question by a juror:) Was there a set-screw or anything on the end?

A. No; you could not. It was just a common cap on gas pipe. The cap was about an inch and a quarter long, turned onto the end of the shaft of gas pipe.

(By the JUROR:) Do you consider that safe?

A. Well, yes. It was generally considered safe if the babbitt was all right. Of course when the babbitt got melted out the pulley would rattle and jam up against the end. I have seen the cap worn half an inch where the pulley had run down onto it. As long as the babbitt was there all right it was considered safe. I considered it safe enough.

(By Mr. HAINES:)

Q. Safe enough provided (cut short)——

A. Provided everything was right.

(By Mr. MCNAUGHT:)

Q. Provided the babbitt was in?

A. And the nut was screwed up, as it ought to be screwed up, hard with the pipe tongs.

(By Mr. HAINES:)

Q. State whether that was an easy job or not to screw that nut up.

A. Very easy.

Q. And if the nut was not properly screwed on hard what would you consider?

A. Then it would rattle off, of course, when there was any friction.

Q. Could a person unacquainted with the construction of that machine, Mr. Spaulding, that was running the trimmer there, tell the manner in which the nut was put on?

A. No, sir; not unless he put it on himself.

Q. Who put the nut on the machine when it came off?

A. The foreman of the mill or Mr. Campbell, the master mechanic.

Q. These times that it fell while you were there, who replaced it?

A. Sometimes I did and sometimes Mr. Campbell did. We used to take the pulley off and rebabbitt it. Sometimes Mr. Campbell or one of the men in the machine shop of the mill when Mr. Campbell was away.

Q. Mr. Campbell, what position did he occupy, if any, there?

A. Master mechanic.

Q. Do you know what position he occupies now?

A. Master mechanic, I believe, still.

Q. Do you know of any way in which this machine could have been made safe even although the babbitt did wear out?

A. Yes, sir.

Q. State how.

A. There could have been a rod put through the pipe and a nut on the end of the rod through the caps.

Q. Have you seen that machine since the accident when Mr. Hawthorne was injured, on the 28th of October, 1885; have you seen it since?

A. No, sir; I have not.

Q. Do you know whether this shaft that was put up there by Mr. Colman, whether it was made for a trimmer or whether it was a piece of gas pipe?

A. Which?

Q. The shaft, whether that piece of gas pipe, whether that was made for a trimmer or whether it was just an ordinary piece of gas pipe?

A. Well, it was an ordinary piece of gas pipe cut off and put there. It had to be bent at an angle to keep the belt on the pulley.

34 Q. Do you know how this machine was oiled?

A. How?

Q. How was this machine oiled?

A. Through the ends of the caps or nuts.

Q. And how did the oil get onto the shaft?

A. Through holes punctured in the shaft.

Q. If these holes were filled up, how could that be ascertained if the holes were filled up?

A. Well, it could not be ascertained at all.

Q. Could it be ascertained without taking the pulley off?

A. No, sir.

Q. How long have you known Mr. Hawthorne?

A. I have known him by sight 7 or 8 years; 7, I think.

Q. Did you ever see him at work?

A. Yes, sir.

Q. How frequently?

A. Once that I remember of in particular.

Q. Do you know what his apparent physical condition was as regards strength and ability to work?

A. I always considered it good. I never had any personal acquaintance with him.

Q. How did he compare with other men as regards his ability to work, so far as his looks was concerned?

A. He compared very well.

Q. Have you any idea what such a man as Mr. Hawthorne would ordinarily be able to earn a day?

Mr. McNaught: We object. There is no averment (interrupted)——

Mr. Haines: From the 28th of October, 1885, down to the present time?

Mr. McNaught: We object. There is no averment in the complaint of his ability to earn any amount of money.

The Court: It would depend very largely what occupation he had, what chances he had for employment, what he wanted to hire out for.

Mr. Haines: I think the question is incomplete.

(By Mr. Haines:)

Q. Do you know what Mr. Hawthorne's business was when you knew him?

A. A carpenter.

Mr. McNaught: We object. It is not averred in the complaint.

The Court: If that is the only objection it is overruled.

Mr. McNaught: That is the objection I am making.

The Court: Objection overruled, and let an exception be noted.

(By Mr. Haines:)

Q. Did you ever call the attention of any person connected with the management of that mill, while you were employed, in the employ of the defendant in this case, to the condition of this trimmer?

A. Not that I could swear to. I have no recollection of it particularly.

Q. Did you know Mr. Weymouth?

A. I did.

Q. What did he have to do with that mill?

A. He was superintendent—assistant superintendent of the road. Of course I was under his (interrupted)——

Q. Did he have anything to do with the mill as superintendent of the operation of the mill in any way?

A. No, sir; no more than Mr. Milner does. He was general superintendent of the mill and railroad.

35 Q. Of the railroad company?

A. Yes, sir.

Q. To which the mill belonged?

A. Yes, sir.

Q. Did you ever have any conversation with Mr. Weymouth in regard to this machine?

A. Nothing more than to call his attention (interrupted)——

Mr. McNaught: I think I will object to that.

Mr. Haines:

Q. That is while he was acting in this capacity as assistant superintendent?

A. It would be uncommon to build a machine of that kind—that is, the way the pulleys were constructed.

Q. Just state the substance of the conversation you had with Mr. Weymouth in regard to that.

Mr. McNaught: We object to the question. Neither Mr. Weymouth or the witness have anything to do with the company at this time nor haven't had for a great many months.

The Court: This present time?

Mr. McNaught: Yes, sir. We object to any conversation that the witness may have had with Mr. Weymouth at any time unless Mr. Weymouth had something to do with the company at the time of the injury or since or near that time.

The Court: A conversation with Mr. Weymouth, in order to bind the company, must have been at a time when he, Mr. Weymouth, was in some way related to the company as manager or superintendent or something else, and that must have been at or before the accident complained of, unless the conversation related to some knowledge on the part of Mr. Weymouth which he in the conversation is shown to have known or otherwise shown to have known about that time or at that time. That, I suppose, is the rule.

Mr. Haines: I propose to show it was before the accident happened and while he was superintendent or assistant.

The Court: The witness has already stated that the conversation was had while he was superintendent of the mill and railroad, as I understood the witness, but he has not said whether it was before the accident or not, or at least I have not heard it.

(By Mr. Haines:)

Q. Was this conversation before or after the 28th of October, 1885?

A. It was before.

Q. Now state what that conversation was.

Mr. McNaught: We object.

The Court: Objection overruled; let an exception be noted.

A. I don't; I can't recall any of the words that were spoken.

Q. I don't ask for the words, just the substance?

A. I called his attention to the machine being an unusual—built in an unusual way; that is all.

Q. Did you make any suggestion in regard to it?

A. Not that I can recollect.

Q. Did you say anything about changing it?

A. No. At the time he was there the mill was talked of being
changed over in the new mill or new machinery put in the
36 new mill. I had probably spoke to him about the trimmer if
that was going to be changed in the new mill, as it was, or a
new trimmer; something of that kind. I don't remember exactly
what I said to him.

Q. What was there unusual about the construction os this trimmer that you called Mr. Weymouth's attention to?

A. The line that run through the frame of the trimmer.

Q. In what respect did you call his attention to what was unusual about it?

A. Well, the angle of the shaft; the manner in which the pulleys were kept—the belt was kept on the pulleys.

Q. What objection, if any, was there to that method of construction? What was the trouble with it?

A. Well, the belt run off. It used to often run off if the shaft canted a little or worked where it went through the head of the trimmer.

Q. What did Mr. Weymouth say, do you know?

A. He said they wasn't going to use that trimmer.

Mr. Haines: That is all.

Mr. McNaught: No qustions.

(The court excuses the jury, after cautioning them, until Monday, June 27th, 1887, at 9.30 p. m.)

June 27th, 1887—1.30 p. m.

Henry Shehan called as a witness for the plaintiff and duly sworn.

(By Mr. Haines:)

Q. State your name and residence.

A Henry Shehan; Seattle.

Q. How long have you resided here, Mr. Shehan?

A. Eleven years.

Q. What is your business at the present time?

A. Working in saw-mills.

Q. In what capacity?

A. I am tallyman, and working on the trimmer and such like as that.

Q. What mill are you working in now?

A. Stetson & Post's.

Q. How long have you followed the business of saw-mill man or working around the saw-mill?

A. Ever since I was a boy.

Q. How long have you worked in saw-mills in this town?

A. 11 years; excepting two years I was on the street.

Q. Are you at all familiar with the machinery ordinarily used in saw-mills? Are you familiar with its operation?

A. Well, I am around trimmers and such like as that.

Q. You have run trimmers?

A. Yes.

Q. Do you know anything about the mill owned by the defendant, where the accident occurred that is the subject of this litigation?

A. I worked there.

Q. When did you work there?

A. 6 years ago.

Q. How long did you work?

A. I worked there about three months. I think it was about three months; 2 or 3 months.

Q. Did you ever see the trimmer in that mill?

A. I have.

Q. How was that trimmer constructed at that time?

37 Q. Well, it was different from any trimmer that I ever saw.

Q. In what respect?

A. Well, it run on two loose pulleys up over the belt; it run on two loose pulleys on a gas pipe.

Q. On a gas pipe?

A. Yes.

Q. How were the pulleys kept on?

A. I don't remember how that was; I never noticed it.

Q. How are trimmers usually constructed?

A. Well—(pauses).

Q. How are the pulleys—are they loose pulleys?

A. No, sir.

Q. How are they constructed?

A. They are put onto a shaft and it revolves.

Q. The pulley and the shaft, both together?

A. The pulley and the shaft, both.

Q. In this trimmer does the shaft revolve at all?

A. No, sir.

Q. The pulleys revolve on the shaft?

A. Yes, sir.

Q. Did you ever operate this trimmer?

A. I have.

Q. Did you ever know while you were employed there any of those pulleys to come down?

A. It come down while I was there, and I quit work.

Q. Do you know the cause of its falling once?

A. I don't know; I suppose the nut came off; I don't know.

Q. Do you know about the shaft, whether the pulley slipped from the shaft or not?

A. The pulley came right down alongside of me.

Q. Who was master mechanic of that mill at that time?

A. Mr. Campbell always done the work around there. Mr. Colman was (interrupted)——

Q. Do you know whether Mr. Campbell is employed about the mill there now?

A. I think he is; I don't know.

Q. How long since you have been down there?

A. I have been there a month or two ago.

Q. Who was operating the mill at the time you worked there?

A. Colman.

Q. Do you know in what capacity he was there—whether he was the owner of the mill or whether he was operating it?

A. He was the owner of the mill when I was there; I think he was the owner.

Q. Do you know whether this same Mr. Campbell has been in the employ of the defendant in this case, The Columbia & P. S. R. R. Co.?

A. What did you say?

Q. Do you know whether the same Mr. Campbell has been in the employ of The C. & P. S. R. R. Co., the defendant in this case, in the mill there?

A. I think so.

Q. When did you last see him there or know of his being there in the employ of the defendant?

A. Oh, I have seen him there—I don't know exactly when I have seen him there.

Q. The last time that you can state with certainty?

A. I have seen him coming from work there within the last week, but I don't know whether he was to work there or not.

Q. Are you familiar with the way that nuts usually turn when
they are put on a shaft to keep a loose pulley or saw
38 or anything of that kind on the shaft?

A. I never saw a loose pulley fixed that way.

Q. Never saw one?

A. No.

Q. How are the trimmers constructed with reference to their being protected—are they protected in any way?

A. Well, the shaft—all of the trimmers I ever saw, the shaft goes across the swing, and it is a solid shaft, and the pulley is put onto that and keyed on, and then that shaft runs in boxes—in boxes to hold it down.

Q. How about the pulleys?

A. The*y* pulley is on the shaft and the pulley and shaft revolve at the same time.

Q, This box, is this box as large as the pulley?

A. Oh, no; it is just for the shaft to run in.

Q. Was there anything around this shaft?

A. I think not; it is a loose pulley.

Q. Do you know Mr. Hawthorne, the plaintiff in this case?

A. I do.

Q. How long have you known him?

A. About 9 years.

Q. Do you know what his physical condition was prior to the time of receiving this injury?

A. Well, I always supposed it was good.

Q. Well, how did he appear to be? Did you ever see him at work?

A. Yes; I have seen him at work.

Q. Did you ever work with him? Do you know what kind of a man he was to work?

A. No; I do not.

Q. Well, what was his physical condition, apparently?

A. Good.

Q. How as regards strength?

A. I do not know.

Q. Did you ever notice him especially at work?

A. Always seemed a good worker.
Q. A good worker?

(No answer.)

Cross-examination by Mr. McNaught:

Q. Mr. Shehan, you worked two or three months, you say, in this mill?
A. Yes.
Q. You ran the trimmer?
A. Yes, sir.
Q. Two or three months, and the pulleys were loose—pulleys that revolved on the shaft?
A. Yes, sir.
Q. In working around the planer you could see the pulleys from the point where you were working in different places?
A. I was working on the trimmer.
Q. You were working on the trimmer. Working around the trimmer and on the trimmer you could discover the way it was made?
A. Yes.
Q. Working on the trimmer you could see the pulleys up over head and see they were loose?
A. I could see they were loose pulleys.
Q. You could see them when you were working on the trimmer up over head?
A. Yes.
Q. And saw they were loose pulleys?
A. Yes, sir.
Q. You could see the peculiar structure?
A. I saw this was different from other trimmers.
39 Q. When you were working there?
A. Yes, sir.
Q. You could see it?

(No answer.)

Redirect examination by Mr. Haines:

Q. You could see how this nut turned when it was on?
A. No, sir; I never took any notice.

(By Mc. McNaught:)

Q. Never noticed that?
A. I don't know to-day how it is fixed, either.

William Morris called as a witness for the plaintiff and duly sworn:

Q. Where do you reside?
A. In Seattle.
Q. How long have you resided here?
A. About sixteen years.
Q. What is your business at the present time?

A. Guarding prisoners; looking after the city prisoners.

Q. Have you ever worked in a saw-mill?

A. Yes, sir.

Q. How long?

A. About fifteen years.

Q. In what capacity?

A. Different kinds.

Q. Did you ever work about the machinery of a saw-mill?

A. Yes, sir.

Q. About what portion of the machinery have you worked?

A. On the edger and trimmer mostly.

Q. Did you ever work in the mill owned by the defendant, where Mr. Hawthorne was injured?

A. No, sir.

Q. You never worked there?

A. No, sir.

Q. Did you ever see the trimmer down there?

A. I did, sir.

Q. When did you see it last?

A. Well, I seen it a little after the accident.

Q. Did you ever see it before the accident?

A. No.

Q. What did you say?

A. No, sir.

Q. Where were you at the time this accident occurred?

A. Well, I was standing, I should say, about 24 feet away, at the end of the rollers; that was about 24 feet.

Q. About how far?

A. At the end of the rollers.

Q. What were you doing?

A. I was waiting for the car.

Q. State what you saw.

A. Well, I seen the pulley come down and hit Mr. Hawthorne on the head—struck him on the head (illustrating), and then it came down on the rollers and fell to the ground, and there was a nut, I believe—I wouldn't swear to that—there was a nut fell off the other way, towards the posts.

Q. Did you help Mr. Hawthorne in any way?

A. Yes, sir.

Q. State whether he was conscious or not after he was struck.

A. No, sir.

Q. Did you ever see a trimmer like this before?

A. I did, sir.

Q. Where?

A. At Port Orchard.

Q. Whose mill was it in?

A. In Mr. Colman's.

Q. Did you ever see any except these two?

A. No; not constructed like that.

40 Q. What is there peculiar about the construction of this trimmer different from other trimmers?

A. It was run on loose pulleys. I never seen one like that before.

Q. How do they usually run?

A. Run in a box.

Q. How is the shaft? Is the pulley loose or fast to the shaft?

A. Fast; keyed on.

Q. Do you know what this shaft was made of?

A. Of gas-pipe.

Q. State whether that is usual, to have gas-pipe for a shaft.

A. I never seen them.

Q. Never saw one? How was the pulley kept on the shaft?

A. Well, there was a cap. It is a good while since I looked at it.

Q. State you- best recollection.

A. There was a cap on each end that kept it on—of the gas-pipe.

Q. Do you know the way that nuts on shafts, intended to keep pulleys or anything else revolving around the shaft on—the way the thread is usually cut?

A. We generally put them on the opposite way to the saw—the opposite way the saw is running.

Q. What is the object of that?

A. It has a tendency to tighten up the saw if it is loose.

Q. Would you consider it safe in machinery of this kind to put a cap on having the thread cut so that as the pulley turned ahead the nut would turn off?

Mr. McNaught: We object. The witness is not shown to be an expert machinist; he does not claim to be.

Mr. Haines: He has worked about mills for nearly 18 years on this very class of machinery.

The Court: I think it should go to the jury for what it is worth.

Mr. McNaught: We except.

The Court: The exception is allowed.

(By Mr. Haines:)

Q. I ask you would you consider it safe on a machine of this kind to have a nut turned on—that is, have the thread cut in such a manner that the pulley went ahead. If there was any friction between the pulley and the nut, the nut would turn off?

A. I think it would not be safe. It would have a tendency to loosen the nut, I think; I am sure it would.

Q. Did you know Mr. Hawthorne before this injury occurred?

A. Yes, sir.

Q. How long have you known him?

A. Well, I have known him intimately for 6 or 7 years, I guess; but I knew him before that; seen him and talked with him.

Q. Have you known what his ability was to work up to the time he received this injury?

A. I know him to be a pretty good man to run an edger and keep a mill going.

Q. How as regards strength?

A. I don't know anything particular about his strength.

Q. Have you ever seen him at work; have you worked with him?

A. No.

Q. Have you seen him at work?

A. Yes, sir.

41 Q. State what his appearance was as to having sufficient strength to do the work he was engaged in. How did he look? Did he look like a strong man or a weak man?

A. Medium.

Q. What did you say?

A. Yes; he looked equal to all strong ordinary men.

Q. What did you say?

A. He looked as strong as any other ordinary man, in my opinion.

Cross-examination by Mr. McNaught:

Q. When was it that you saw a trimmer like this one in operation at Port Orchard, Mr. Morris; how many years ago?

A. Very nearly 20 years ago.

Q. 20 years ago? Do you know how long that edger at Port Orchard was operated?

A. The trimmer?

Q. The trimmer—yes.

A. Well, it operated all the time I worked in Port Orchard.

Q. How long was that?

A. Three or four months.

Q. 3 or 4 years?

A. 3 or 4 months.

Q. 3 or 4 months?

A. Yes, sir.

Q. Do you know whether, as a fact, it was there several years?

A. I couldn't tell you.

Q. You don't know?

A. No.

Q. Did you operate it yourself?

A. I did, sir.

Q. How long?

A. I believe the most of the time I was there.

Q. 3 or 4 months?

A. Yes, sir; I was all of that time there.

Q. Yes. Mr. Colman was one of the proprietors of that mill at that time?

A. Yes, sir; and Folk.

Q. They were the owners?

A. Yes, sir.

Q. Mr. Colman was the person superintending the mill?

A. Yes, sir.

Q. Is that the same Mr. Colman who constructed this edger in this mill in question?

A. I don't know, sir.

Q. Well, you know Mr. Colman?

A. I don't know whether he constructed this mill.

Q. This same Mr. James M. Colman who is here in town and who for a time run this mill?

A. Yes, sir.

Q. The same Mr. Colman?

A. Yes, sir.

Q. Did you ever examine this edger to see how much play there was between the pulley and the nut?

Mr. HAINES: You mean the trimmer?

Mr. McNAUGHT: Yes; the trimmer

A. No; the way it used to run, it used to jerk.

Q. This trimmer?

A. Yes, sir; the trimmer, as if it was not solid, it seemed to me.

Q. When did you observe that?

A. Well, I observed that several times when I was standing there. I have been around there looking at him when I was not working.

Q. Did you observe it that morning of the accident?

A. No; I did not.

Q. You looked at it that morning?

A. No, sir.

42 Q. You don't know, then, how much play there was between the nut and the pulley on that edger?

A. No, sir; I couldn't tell you.

Q. Then you don't know whether there was any friction there or not, provided it was kept oiled?

A. In fact, I don't know how a loose pulley would work.

Q. You don't know how a loose pulley would work?

A. I don't think that would work very well.

Q. You don't claim to be a machinist?

A. No, sir.

Q. Did you work at this mill at any time?

A. No, sir.

Q. Just happening to be there that morning of the accident?

A. I was working for the company.

Q. Oh, yes; but not at the mill?

A. No, sir.

Q. What were you doing at that time?

A. I was on the section.

Q. On the road?

A. Yes, sir.

Q. You are not a mechanic?

A. No, sir.

Q. Nor a machinist?

A. No, sir.

Redirect examination by Mr. HAINES:

Q. Mr. Morris, there is one question I wish to ask you. Do you remember what time it was that Mr. Hawthorne received this injury—that is, that this pulley fell?

A. It was in the morning.

Q. What time of day?

A. About 8 o'clock, I should say—between 7 and 8, I think. I would not be sure. I know it was somewhere about that time.

Q. Between 7 and 8?

A. Yes, sir.

Q. What means have you of remembering, if any, the hour?

A. Because I was waiting for the car to go out. They were loading on coal and getting ready. They were a little after time that morning, I think. We were waiting.

Q. What was the regular time of that train?

A. I think it was 7 o'clock.

Q. The train hadn't gone?

A. Our time was 7 o'clock, anyway, to work.

Q. The train hadn't gone yet?

A. It hadn't gone.

Q. You say between 7 and 8. Which hour was it nearest to, according to your best recollection?

A. I think it was nearer 7 o'clock.

Recross-examination by Mr. McNaught:

Q. As to the time, you say that is simply your recollection. You might be mistaken as to the time. Wasn't the ordinary time of that train leaving that saw-mill 7.30?

A. I think so.

Q. Do you remember of another train that usually left at 9.40 at that time?

A. I don't know.

Q. You don't know?

A. I think it was between 7 and 8—nearer 7.

Q. That is your recollection about it?

A. Yes, sir.

Q. Still you might be mistaken as to the time?

43 A. I am pretty sure of it.

George W. Bullene called as a witness for the plaintiff and sworn.

(By Mr. Haines:)

Q. Where do you reside, Captain?

A. Seattle.

Q. What is your business at present?

A. At present?

Q. Yes, sir.

A. I am United States boiler inspector for this district at present.

Q. Have you ever been a machinist?

A. Yes, sir.

Q. How long?

A. It is going a good while back to remember; probably 40 years; maybe more.

Q. Are you familiar with the construction of machinery in saw-mills, as used in saw-mills?

A. Somewhat.

Q. Did you ever see the trimmer in the mill of the Columbia & P. S. R. R. Co., where Mr. Hawthorne received the injury that is the subject of this lawsuit?

A. I have seen a trimmer, but I don't know which one you refer to; but I have seen a trimmer there.

Q. How many trimmers are there in the mill?

A. I don't know; there is one particularly that I remember; there might be more.

Q. You have no recollection of any more than one? How was this trimmer constructed?

A. Well, it was rather a peculiar construction in this particular—it is peculiar—it seems to be a stationary shaft at the head of the trimmer frame, with a couple of loose rider pulleys. Those pulleys were probably twice the diameter of the pulley (pauses), I should say probably 12 or 15 or 16 inches, more or less, with probably a 5 or 6 inch face on the shaft, and run loose.

Q. Do you know what this shaft was constructed of?

A. I really do not.

Q. You never took the trimmer to pieces?

A. No, sir; I saw that trimmer at divers times. I am generally around mills a good deal where the construction is going on. I took that mill in with others at divers times; rather a peculiar construction.

Q. Do you know how those pulleys were kept on the shaft?

A. Well, I can't say that I do know just how they were kept on, whether by a nut or a collar. I don't know that I noticed that particularly.

Q. Did you ever notice whether when the saw was pulled out for the purpose of using it in trimming whether that made any difference in the angle at which the shaft lay?

A. Probably when the saw was pulled out through the cut the shaft would be on a level, I should judge, if I remember.

Q. When the saw was let back?

A. Well, it would stand on an angle of 10 or 12 degrees, maybe. I don't know exactly, but from 10 to 12 degrees; maybe more and maybe less—that is, I mean that the end of the shaft was tipped down 10 or 12 degrees.

Q. Towards or away from the man who was operating the trimmer?

A. The declination would be towards the face of the trimmer.

44 Q. What effect would that have upon the pulley that was nearest him—suppose that that pulley was kept on the shaft by a nut or cap on the end of the shaft?

A. The consequence would be that the pulley would run against the nut or collar—whatever kept that on—all the time the saw was out of the cut, which would be most of the time.

Q. Suppose that the pulley was kept in place by a cap such as is put on the end of gas pipe in order to seal up the end of the pipe, and the thread was cut so that the nut or cap turned off when turned in the same direction that the pulley revolved—that is, if there was any friction sufficient to bind them together, that the nut would have a tendency to turn off—that is, as the pulley went ahead—what, in your opinion, would that machinery be so far as regards safety?

A. If the nut turned off when the pulley was working (interrupted)——

Q. Would you consider a machine constructed in that manner a proper or safe machine for use in that place?

A. No, sir; I do not consider it a proper construction. It was rather an unusual construction, and seems to be used to avoid shafting or belting, or rather a way to get rid of expense in construction. I don't know whether they considered that or not. According to where they took their power from.

Q. Could a person who was operating that trimmer, and that person not a skilled machinist especially—suppose that was a cap—tell which way that thread was cut without unscrewing it?

A. Probably not.

Cross-examination by Mr. McNaught:

Q. Do you remember, Mr. Bullens, when you first observed this trimmer?

A. Oh, I could not tell you exactly.

Q. You don't remember the number of years?

A. No; I don't remember. I have seen it quite often. There was a similar one here in town—somewhat similar—constructed before that, I believe. It is rather an unusual way of building; I noticed that.

Q. Where was that one constructed?

A. I think it was in the Commercial mill. I don't know whether it was constructed the same, but the general princip*als* (interrupted)——

Q. That is, there were loose pulleys?

A. Loose pulleys.

Q. But the general principles of the one in the Commercial mill was like this?

A. Similar; yes, sir; if not nearly identical.

Q. Nearly identical. Do you know how many years that was used in the Commercial mill?

A. I do not.

Q. Were you ever at the Port Orchard mill during the time that Colman and Folk had it?

A. Yes; I believe once.

Q. Did you notice the trimmer?

A. No.

Q. Can you say whether they had a similar trimmer?

A. I could not tell.

45 Q. Do you know who constructed this one in the Commercial mill?

A. I don't know. It was under the supervision, I think, of Mr. Lair. That mill, I think, was constructed under his supervision.

Q. Under his supervision?

A. I think so.

Q. Your observed the condition of this — of machinery, that the pulleys were loose, and observed all that you knew about it from standing that morning (interrupted)——

A. Yes, sir.

Q. Near the machinery?

A. Yes, sir.

Q. Standing about where a person running the machine would stand, or in that neighborhood?

A. I could not say. I noticed this work as I passed into the mill.

Q. As you passed around?

A. Yes, sir.

Q. And it was visible to the naked eye all you have testified to here?

A. Yes, sir; it was visible.

Q. Did you observe about how much play there was between the pulley and the nut?

A. There could not be any when the trimmer was swung back. It would fall right down onto it.

Q. That is, when it was cutting?

A. When it was pulled out the shaft may have come level or a little inclined the other way. Really, I could not tell about that.

Q. You didn't observe how much play there was?

A. There couldn't be any when the saw was drawn back.

Q. That is not the question I asked you.

A. I don't understand. Just put your question as a mechanic.

Q. Then when the saw was pulled out how much play would there be between the pulley and the nut?

A. That I could not tell.

Q. Do you know anything about the depth of the threads and the length of the screw?

A. No; not any at all.

Q. You don't know with what strength the nut was put on?

A. No, sir.

Q. About how many times did you observe this machinery?

A. Oh, I could not tell you; different times.

Q. A dozen times?

A. I could not tell you, sir; one or more. I always notice these things. That is my business. When I am passing through the mills I notice this work. That is about all there is about that part of it.

Q. And the only structure that you ever observed particularly like this one was the one in the Commercial mill?

A. That is the only one I remember of.

Q. Do you know how many years this piece of machinery was in use?

A. I really do not.

Q. You never had any experience in using a piece of machinery of this kind?

A. I have never made any construction that I remember of of that particular nature in any mill work.

Mr. McNaught: That is all.

Redirect examination.

(By Mr. Haines:)

Q. Have you ever had anything to do in constructing machinery for mills?

A. Considerable.

Q. How many mills have you had anything to do with the constructing of machinery of?

46 A. I was master mechanic in Pope & Talbot's mill, at Port Gamble, three years. I had charge of and rebuilt the machinery of or rebuilt nearly all the machinery in the Madison mill. I built the machinery in the Tacoma mill, in the new mill, and some others. I have been working in different ones, working pretty much all the time. I have been on the coast 20 years, most of the time connected with these mills.

Q. Did you say you didn't know who constructed this trimmer in the Commercial mill?

A. I do not; but the mill, I think, was constructed under the supervision of Mr. Lair.

Q. This Mr. Lair in town here?

A. He is a shoe dealer on the corner of James and Front street-.

Q. There is one question that I want to ask that I overlooked in regard to the use of oil on machinery. Does the use of oil remove friction entirely?

A. Evidently it does or they wouldn't use it.

Q. Does it remove it entirely?

A. No, sir; not entirely.

Q. It lessens it?

A. Yes, sir; lessens it.

Recross-examination by Mr. McNaught:

Q. The very object of using oil is to lessen and prevent friction?

A. Yes, sir.

Q. It has that effect and tendency?

A. Certainly.

Second redirect examination by Mr. Haines:

Q. Does it have a tendency to prevent friction?

A. Well, that is hardly it; it lessens it.

Q. Lessens it?

A. Lessens it. He couldn't use the trimmer, of course, if it was not oiled. It wouldn't run at all—no time. It would burn out. Oil is used to prevent that—to prevent the abrasion of the iron. Of course the friction is lessened.

Q. There is always some friction in the use of machinery?

A. Oh, yes, sir.

Q. Does not friction depend in a measure upon the weight with which the substances are brought together?

A. Very much, and the surfaces that are exposed.

CHARLES F. REITZE called as a witness for the plaintiff and sworn.

(By Mr. HAINES:)

Q. Mr. Reitze, what is your business?

A. I am manager of a planing mill.

Q. What mill?

A. Stetson & Post's mill.

Q. How long have you been in the mill business?

A. I have been in the planing-mill business now about 15 years.

Q. Whereabouts?

A. First in Indiana and then in California and then, for the last 11 years, here in Seattle.

Q. What mills have you been [engaged in here in Seattle?

A. Stetson & Post, one of my own, and in the Commercial mill, and now in Stetson & Post's again.

Q. Are you familiar with the machinery used in a mill, and especially the trimmer?

A. Yes, sir.

47 Q. Did you ever see the trimmer in the mill of the Columbia and Puget Sound R. R. Co., where this accident to Mr. Hawthorne is said to have occurred?

A. Yes, sir; I have noticed it and examined it.

Q. How is that trimmer constructed?

A. Well, the trimmer is constructed a little different from ordinary trimmers. It has two idlers on top of the frame, and it runs a belt a quarter turn to work the saw.

Q. Are those pulleys fixed pulleys or loose pulleys?

A. Loose pulleys.

Q. Is that the usual way of constructing trimmers?

A. It is about the only one I ever noticed that is made that way.

Q. How are they usually constructed?

A. They are usually constructed with a shaft directly opposite to the saw, and there is a counter-shaft with a fixed pulley on the top of the frame.

Q. Are there any pulleys overhead usually?

A. Yes, sir; there is always a pulley overhead.

Q. How are they located with reference to the man that works the trimmer?

A. Well, they are directly over him.

Q. And how is the shaft? What does the shaft run in?

A. It is what we call a counter-shaft that runs at the top of the frame, extending from one side of the frame to the other, and the pulleys are in the center of the shaft.

Q. In this trimmer do you know how the pulleys were kept on the shaft?

A. Well, I noticed they were kept on with a nut at the end of the shaft.

Q. Suppose that the nut turned on—that is, that the thread was cut in such a manner that the nut turned off the same way the pulley revolved, would you consider that to be a proper or improper method of putting that in?

A. It would be a very improper method.

Q. Why so?

A. In all our machinery, especially saw-benches, or anything of that kind, we always make the nut turn off opposite the way in which the pulley does, so that in case of the pulley or the saw getting stuck or fastened the nut will turn tighter instead of looser.

Cross-examination by Mr. McNaught:

Q. Mr. Reitze, how often have you made an examination of this trimmer?

A. Well, only one thorough examination of it. I noticed it a number of times. I just made thorough examination of it once.

Q. When was that?

A. That was yesterday afternoon.

Q. You made that at the request, I suppose, of Mr. Haines?

A. No, sir.

Q. At whose request?

A. I didn't make it at anybody's request. They asked me if I was willing to testify as an expert in this case. I told them I didn't know anything about it.

Q. So you went down and examined it for the purpose of (interrupted)——

A. Informing myself.

Q. Did you go up onto the machine—up on top?

48 A. Yes; I went up on top of the machine.

Q. All around?

A. All around, and examined it.

Q. That was the only time you ever made any examination of it?

A. It is the only time I ever made a thorough examination. I have noticed the saw two or three times. I noticed how the pulleys were put up there, but I never noticed how they were fastened in place.

Q. That you noticed from walking around the machine?

A. Yes; my attention was called to it the first time on account of the unusual construction of it, and I noticed it carefully when it was first built because it was the first one I ever saw made that way.

Q. Do you remember when that was first constructed?

A. I don't remember exactly, but it is 7 or 8 years ago the first time I noticed it.

Q. And at that time that is the first one you ever saw constructed?

A. It was the first one I ever saw constructed.

Q. Do you know who constructed it?

A. I do not.

Q. Now, hasn't that been in constant use, or almost constant use, since that time?

A. I think it has.

Q. Were you ever about the Port Orchard mull at the time that was in operation here?

A. No, sir.

John S. Anderson called as a witness for the plaintiff and sworn:

Q. Where do you reside, Mr. Anderson?

A. In Seattle.

Q. What is your business?

A. I have a little planing mill at the present time; manufacturing sash and doors and doing contracting and building, &c.

Q. Have you ever worked in a saw-mill or had anything to do with saw-mills?

A. I have.

Q. In what capacities?

A. Part owner of a saw-mill on this sound.

Q. For how long?

A. A party and I built that mill in '80, and I was in it until the fall of '85.

Q. Did you ever see the trimmer in the mill of the defendant, where this accident is said to have occurred to Mr. Hawthorne?

A. I have seen it.

Q. Do you know how it is constructed?

A. Well, nothing more than just by passing through the mill and looking at it; that is all. I have seen it working there.

Q. Could you tell anything about its construction from the observation that you gave it?

A. Well, I don't know that I could tell minutely.

Q. Well, just give the general construction—give the jury a general idea of it.

A. What a man that is in the mill business would naturally notice, that is all that I know about it.

The Court: You are asked to give the jury a general idea of its construction, if you can.

A. Well, the saw, it is a shaft that is fastened on the top of the
frame—of the swinging frame that runs the saw—that the saw is
appended to; that shaft I noticed in passing through the mill moves
(witness illustrating with a pencil) this way (showing); when
49 the saw is pulled out, the man that is working on this side,
this comes out (illustrating), and when it goes back it goes
this way (showing). When it is up it is very near plum-; there is
two loose pulleys, the one on this side and one that side; the belt
comes over this way (showing); it comes through this way and runs
down under through this way (showing) from the other pulley somewhere. I never noticed that one exactly, where that other pulley is situated. I only saw that was the general construction of the trimmer.

Q. Did you notice how the pulleys were kept on the shaft?

A. I don't know.

Q. Suppose that the pulley on the one nearest where the man was working, where a man would be stationed in working; suppose that that pulley was kept on the shaft by a cap like the cap on the end of a piece of gas pipe, and suppose that shaft was a piece of gas pipe, and the thread was cut so that the cap screwed on in such a way that it turned off the same way that the pulley turned when revolving, would you consider that a safe or proper way of constructing that trimmer?

A. If the nut or whatever it was fastened on there—if it had been put on very tight it might hold, but it might work off.

Q. Would you consider that a proper way of constructing the machine?

A. I would not.

Q. State how trimmers are usually constructed in saw-mills.

A. Trimmers are usually constructed to swing. The saw is fastened at the lower end of the swing. The upper end is fastened with a shaft through it. On that shaft there is two pulleys. One pulley is the driving pulley for the upper shaft and the other pulley is the driving pulley for the lower shaft, the one where the saw is fastened, and which is called the arbor shaft. They are generally fastened on with keys. Those pulleys and the shafts work in boxes. Some shafts are made with a collar on each end, in lots of machines, to keep it to its place. Some are made different, so far as that is concerned.

Q. Is it usual to put loose pulleys on the shaft of a trimmer?

A. Loose pulleys?

Q. Yes.

A. I never saw one, that I know of, except in this one instance.

Q. Excepting that one?

(No answer.)

Cross-examination by Mr. McNaught:

Q. Mr. Anderson, were you ever at the Port Orchard mill during the time that was in operation?

A. I never was. The Port Orchard mill was burned, I believe, before I was here in the country.

Q. All that you know about this piece of machinery you observed by just walking around on the floor of the mill?

A. That is all that I know.

Q. The condition of the pulley, that it was a loose pulley, a loose revolving pulley, was a matter that you could discover with the naked eye from observation?

A. That is all I could judge of the condition. I could see
50 from being in the mill. I have been in the mill a number of times, but with no intention, but just as a passer-by. My observation is just simply what a man would make in that business.

Q. You say that if the nut had been well screwed on, good and taught, that it would hold?

A. No; I didn't say that. I say that it might have held. I say that if that nut had been a tight-fitting nut and it had taken considerable power for to put it on, I say that it might have held there. Whether it was such a nut I don't know.

Q. What it was you don't know?

A. I don't know anything about it.

T. D. Brown called as a witness for the plaintiff and sworn.

(By Mr. Haines:)

Q. Where do you reside, Mr. Brown?

A. I reside in Seattle.

Q. How long have you resided here?

A. Five years.

Q. What is your business?

A. Contracting and building at present.

Q. Have you ever been engaged in the saw-mill business?

A. I have.

Q. In what capacity?

A. As foreman.

Q. How long?

A. Nearly ever since I have been in Seattle, with the exception of the last year.

Q. What mill were you foreman of?

A. Foreman of the Yesler mill three years, and Stetson & Post's and the Commercial.

Q. Are you acquainted with the character of machinery that is usually employed in saw-mills in this country?

A. I have a practical knowledge; yes.

Q. Are you acquainted with the machine known as the trimmer?

A. Yes, sir.

Q. Were you ever in the mill owned by the defendant, where Mr. Hawthorne received the injury that is the subject of this action?

A. I have been, occasionally.

Q. Did you ever see the trimmer there?

A. I have.

Q. How was that trimmer constructed that you saw there?

A. It is not geared direct from the main shaft or a counter-shaft. It is geared at angle-, the belt transmitted over riders at a quarter turn.

Q. How about the pulleys on the shaft? Are the pulleys loose or fixed?

A. The pulleys are loose, the shaft swinging on the frame of the saw.

Q. Do you know how those pulleys are kept on the shaft?

A. Well, I see there is a nut on the end of the shaft is supposed to keep the pulley on, but I don't know whether it does.

Q. Did you ever notice the saw when the saw was pulled out or let back by the person operating it, whether there was any change in the angle in which the pulleys revolved or lay?

A. The shaft was hung stationary on the frame, and when the frame swings the shaft will.

Q. Would that make any difference in the position in which the shaft lay?

A. Yes.

51 Q. What difference? Explain it to the jury.

A. Well, when the saw was pulled out the shaft would be nearly level—that is, the pulleys would be level; the shaft is not level. The shaft is not set level at all; it is set on an angle, and when the saw swung back the outside pulley nearest the man would be lower.

Q. Suppose that is kept in place by a nut, as you think it is, what effect would that have on the pulley if the end was tipped down—the end towards the man?

A. The pulley would bear against the nut.

Q. Suppose that shaft was a piece of gas pipe and this nut was a cap, such as is usually put on the end of gas pipe in order to stop it, and the thread was cut in such a way that the nut turned off the same way that the pulley revolved, would you consider that to be a safe or an unsafe machine for a person to operate?

A. It would not be considered safe, unless there was a jam-nut. A single nut would not be safe.

Q. Would you consider that a proper method in which to construct that machine?

A. I would not.

Cross-examination by Mr. McNaught:

—. You are not a machinist, Mr. Brown?

A. I claim to have some knowledge of machinery.

Q. Where did you learn you- trade?

A. In New Jersey.

Q. How many years were you working in machinery?

A. I have been around machinery since I was five years old.

Q. You have been around machinery. Did you ever make machinery a study—do you claim to be a machinist?

A. No, sir.

Q. You don't claim to be a machinist?

A. No, sir; not a thorough machinist.

Q. Your principal experience, then, has been just simply being a foreman and being around about where machinery was?

A. A foreman of a mill under construction and putting up machinery and working machinery.

Q. And working machinery?

A. Yes, sir.

Q. Have you ever worked on any machinery in this country?

A. What is that?

Q. Have you ever constructed any machinery in this country?

A. Yes, sir.

Q. What machinery did you work on the construction of in this country?

A. I worked on the construction of the machinery in the Yesler mill.

Q. That was the mill that Mr. Anderson was connected with?

A. Yes, sir; the Yesler & Anderson mill.

Q. What did you do in connection with the construction of that machinery?

A. At various times they would be changing parts of the machinery, and when I was there they put on an addition to the mill, and they changed nearly the whole portion of the wood-working machinery.

Q. What was you particular work?

A. As foreman.

Q. Foreman?

A. And sup*re*intendant of the work.

52 Q. That is, general superintendent of the mill?

A. Of the manufacturing department; yes.

Q. Of the manufacturing department? The only knowledge you have of this particular machinery you acquired by simply walking around the mill? As to the knowledge of that particular trimmer, that you have acquired it by simply walking around the mill?

—. This in the defendant's mill?

Q. Yes, sir.

A. Yes, sir.

Q. You observed its peculiar structure just from being down on the floor about where the person who was operating the trimmer would stand?

A. No, sir.

Q. Where did you observe it?

A. I examined very closely from above.

Q. You went above and examined it? When did you do that?

A. Yesterday.

Q. Yesterday? Did you ever examine it before from above?

A. Not particularly; no, sir.

Q. How did you come to examine it yesterday from above?

A. I went down and examined it. I was asked to.

Q. Asked to examine it?

A. Not to examine it particularly, but I was asked to testify concerning it. I wanted to have some knowledge of it before doing so.

Q. Who asked you?

A. Mr. McMicken. He did not ask me to make an examination.

Q. But in pursuance of the conversation that you had with Mr. McMicken you went down and made this examination?

A. Yes, sir.

Q. Mr. McMicken is one of the counsel here for the plaintiff? He is a member of the firm of Struve, Haines & McMicken?

A. I suppose he is a member of the firm.

Q. Where are you working now, Mr. Brown?

A. I am contracting and building.

Q. Contracting and building?

A. I have a shop in Yesler's old mill.

Q. You are not, then, running any mill at this time?

A. No, sir.

Q. But doing contract work?

A. Yes, sir.

Q. How many times have you been in this mill of the defendant's when it was in operation?

A. I could not say definitely; a good many times.

Q. How many times did you observe this piece of machinery?

A. I could not say that; frequently, though. I give it no more attention than other pieces of machinery in passing through there.

Q. Did you observe whether the rod that is called the gas-pipe in this case, around which these pulleys revolved, was straight, or was it on an angle?

A. The gas-pipe?

Q. Yes.

A. I didn't know that that rod was called a gas-pipe.

Q. Well, suppose it was—the shaft.

A. It is not straight.

Q. Q. It is not straight? How is it not straight?

A. The belt would not run from the saw arbor if the shaft was straight. It was made on an angle for the purpose of keeping the belt on the pulleys working on this and the lower arbor saw.

53 Q. What you mean to say is that this piece of machinery, then, is not constructed as you have been accustomed or in the habit of seeing such machinery as that constructed?

A. It is not.

Q. You never operated a piece of machinery constructed like this?

A. No, sir; I never did.

Q. How long did you work in the Commercial mill, Mr. Brown?

A. I don't know; about five or six months.

Q. How long did you work in Stetson & Post's mill?

A. Perhaps the same time.

Q. What other mills have you worked in?

A. Yesler's mill.

Q. Was that the only one?

A. That is the only three.

Q. The only three?

—. ——.

Mr. McNaught: That is all.

Redirect examination by Mr. Haines:

Q. In the Commercial mill, when did you work there?

A. I quit there in December.

Q. What was your duty there—what was you engaged in in that mill?

A. Foreman of the manufacturing department.

Q. Did you ever notice the trimmer in the Commercial mill?

A. I never had occasion to examine it; simply noticed it. I never had occasion to work at it.

Q. When did you first see that trimmer in the Commercial mill?

A. Oh, I saw it in 1882, I guess.

Q. How was that trimmer constructed?

A. I think it is geared from the counter-shaft; the arbor is geared from a shaft above; the crane (?) swings from the center.

Q. How about the pulleys; are they loose or are they tight pulleys?

A. They are tight pulleys, fitted with a key or set-screw.

Q. They were that way in December last?

A. I think so.

Mr. Haines: That is all.

Mr. McNaught: No questions.

Dr. E. L. Smith called as a witness for the plaintiff and sworn.

(By Mr. Haines:)

Q. You are a practicing physician and surgeon here, are you, Dr.?

A. Yes, sir.

Q. Are you acquainted with Dr. John Baker?

A. Yes, sir.

Q. Have you been attending him lately?

A. I saw him this morning.

Q. What is his physical condition; is he well?

A. He is confined to the house.

Q. State whether his condition is such as to admit of his becoming a witness in this case to-day or to-morrow.

A. No, sir; I think not. He is not able to be here.

Mr. Haines: T*h*ake the witness.

Mr. McNaught: No questions.

54 H. H. Hawthorne called as a witness for the plaintiff and sworn.

(By Mr. Haines:)

Q. Where do you reside, Mr. Hawthorne?

A. Seattle.

Q. Are you acquainted with the plaintiff in this case?

A. I am.

Q. Is he related to you in any way?

A. A first cousin.

Q. Where were you at the time Mr. Hawthorne was injured, in October last, in the mill of the defendant?

A. I was at his house.

Q. Do you know what time it was when he was brought to the house after that injury?

A. About half past eight in the morning.

Q. What condition was he in at that time?

A. Well, he was partially unconscious. The first time I saw him was in the carriage. He seemed to be entirely unconscious then. As soon as we li*g*ted him he began to move and cry out in a sort of groaning way. I don't recollect what he said; he was trying to talk (interrupted)——

Q. Never mind what he said. I don't care for that. Did you have anything to do with caring for him?

A. I did.

Q. For how long?

A. All the time he was confined to his bed, and afterwards whenever he needed anything in the way of care.

Q. How long was he confined to his bed?

A. About four weeks, as near as I can tell. I- might have been a few days over.

Q. What has been his condition since then as regards strength and ability to earn —?

A. Well, he has been able to walk. He was not able to walk at the end of four weeks. He got so he could walk about the house, across the room, I think, in about six weeks. The first time we got him up was in about three weeks. We got him out of bed long enough to make the bed, and we had to put him back again; and about a week after we got him out in a chair in the sitting-room, and were nursing him a couple of weeks longer. He got so he could stand up and walk a few steps. I think he got out doors the first time in February.

Q. How long had you known Mr. Hawthorne before he received this injury?

A. From childhood.

Q. What was his condition up to the time of receiving that injury as regards strength and ability to work?

A. His strength and ability was a good deal beyond mine.

Q. We are not posted as regards yours.

A. He was a very strong man.

Q. As compared with ordinary men?

A. A very fair man of his size and weight and strength.

Q. How, in regard to his ability to work, did he compare with other men in his walk of life?

A. His ability to work was good and his will was good; a very good man.

Q. I will ask you if you know the value of such labor as Mr. Hawthorne was capable of performing.

Mr. McNaught: We object. There was no averment in the complaint that he was able to earn anything.

The Court: The objection is overruled. The witness may answer.

55 Mr. McNaught: We except.

The Court: Exception allowed.

Q. I will ask you if you know the reasonable value of such labor as Mr. Hawthorne was capable of performing from the time of the injury up to the present time.

A. From three to three and a half a day.

Q. What was his work? What, do you know, has he generally been engaged in up to the time of his injury?

A. He was working at carpentering before that time.

Q. Do you know of his working any since his injury?

A. What? I did not hear.

Q. I say, has he worked any since his injury?

A. Oh, not at all, excepting sometimes to saw a little wood.

Cross-examination by Mr. McNaught:

Q. You state that he has not worked any since his injury, Mr. Hawthorne, except sawing wood?

A. I say he has worked a very little. He has sawed a little wood about the door, and I think he has done a little in the garden. I planted the garden mostly for him myself.

Q. Hasn't he done a good deal of work in the garden?

A. I think not.

Q. Doesn't he spend his time a good deal in the garden?

A. He spends his time out of doors mostly.

Q. Wasn't the principal work around the garden mostly?

A. He has not worked much lately.

Q. Not lately; but until right lately he has been working around the garden?

A. I have not seen him working any this summer.

Q. You haven't seen him work any? Don't you know, as a matter of fact, he has worked some this summer in the garden?

A. Yes (interrupted).——

Q. Don't you know that he worked here mostly about the garden?

A. I saw him trimming his blackberries in the spring.

Q. Hasn't he a farm out here in the country that he goes out to look after occasionally?

A. He has ten acres of land about three or four miles from town.

Q. He goes out there occasionally to look after that?

A. He has not been out there. Since he was hurt he was out once in a carriage with his wife.

Q. Went out once in a carriage; that is the only time he has been out since he was hurt?

A. To my knowledge.

Q. To your knowledge? You don't pretend to swear to every time he has been out there?

A. I don't think he has been out only that one time.

Q. You swear that he has only been there the one time?

A. That is the only time I know about.

Q. Are you certain? Might he not have been there a great many times and you not know it?

A. He could not. I have lived with his family up to last November.

56 Q. You testify that he could not have been there more than once without your knowing it?

A. That is the only time I know of his being there.

Q. You mean up to last November?

A. I was there up to last November from the time he was hurt. Since last November I have lived across the street.

Q. Since last November you don't know. It is possible he might have been out to his farm?

A. I don't know.

Q. You don't know how much work he done there?

A. I was there in the winter, and there hadn't been any work done since last fall. It was rented last year.

Q. It was rented last year?

A. Yes, sir.

Q. Were you out there during last year at any time?

A. Once.

Q. With him?

A. No, sir.

Q. Now, sir, do you know what wages he was earning at the time he was injured?

A. I think two dollars a day.

Q. Two dollars a day?

A. I am not certain.

Q. You say that you have nursed him a good part of the time since he received the injury.

A. I helped nurse him when he was sick.

Q. Have you nursed him recently—within the last few months?

A. Some.

Q. Some. What does he generally complain of now?

A. Complains of pain through his head constantly. He has a constant pain through here (showing).

Q. Does he complain of dizziness through the head?

A. Only as he gets a bad spell.

Q. What do you mean by a bad spell?

A. One time last winter he took a severe cold and some fever, and his head became heated and he lost consciousness for a short time.

Q. How long did that continue?

A. I was not called in for some little time after he was taken, but he continued for about two hours after I was called into the house.

Q. Now, doesn't he frequently complain of dizziness about his head?

A. Not to me.

Q. Not to you. Does he complain of coldness of the feet and lower part of the limbs?

A. Yes; he complains about his feet being cold and sometimes his hands—more about numbness of the hands. He says his hands get numb and his fingers.

Q. Doesn't he sit around a good deal with his feet on a chair or something like that off from the floor?

A. Sometimes he sits with his feet in a chair.

Q. Why does he do that?

A. I don't know.

Q. How is he as to being excitable?

A. Oh, he has had nothing to excite him until this case has come on.

Q. Do you know whether he is excitable or not—irritable?

A. He is not irritable.

Q. He is not?

A. No.

Q. Do you know whether he is easily excited?

A. He seemed to be excited very much the other day coming down here.

57 Q. Were you there this morning when he was examined by Dr. Smart and Dr. Minor?

A. I was not.

Q. Were you with him very much before he received the injury?

A. Oh, yes.

Q. With him for years?

A. Yes; more or less.

Q. What do you call more or less?

A. I lived in the family.

Q. Lived in the family?

A. I boarded there. I worked with him some, but did not work with him all the time.

Q. You worked with him some; for what length of time?

A. Did I work with him?

Q. Yes, sir.

A. Oh, it was off and on. He worked mostly at another kind from what I was doing. Of course, I was with him every day and saw him every day.

Q. Who has been his attending physician since the injury?

A. Dr. Miller.

Q. When did Dr. Miller commence to doctor him?

A. He came up with him when he was brought home.

Q. How often has Dr. Miller been called to attend him since that time?

A. I could not say.

Q. About how often?

A. He was called every day for about two weeks, I think.

Q. And since that two weeks?

A. Every other day after the two weeks for a time; I don't recollect how long.

Q. Well, about how long?

A. I think he attended him about a month.

Q. About a month. Now, since that time, how often has Dr. Miller been called to see him?

A. I could not say.

Q. Well, about how often?

A. Four or five times; I suppose, five or six.

Q. Four or five times. What treatment has he given him since that time—since the month?

A. He has given him medicine when he was out to see him.

Q. He has given him medicine whenever he has been sick?

A. Whenever he has been called.

Q. Whenever he has been called. Do you know anything about the kind of medicine that he gave him?

A. I do not.

Mr. McNaught: That is all.

Redirect examination by Mr. HAINES:

Q. Mr. Hawthorne, you have been asked in regard to Mr. Hawthorne, the plaintiff, putting his feet on a chair and as to whether he was excitable or not. State whether, during your acquaintance with him, before the accident, you noticed any symptoms of that kind.

A. No.

Q. How was he as regards excitability prior to that time?

A. Before he was hurt?

Q. Yes, before he was hurt.

A. Never knew him to get excited at all.

Mr. HAINES: That is all.

58 Mr. HAINES: I read the deposition of Dr. John Baker, the one referred to by Dr. Smith.

(Mr. Haines reads the deposition to the court and jury.)

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle.

WILLARD C. HAWTHORNE, Plaintiff, *vs.* THE COLUMBIA & PUGET SOUND RAILROAD COMPANY, Defendant.	Deposition of John O. Baker.

By agreement of the attorneys for the plaintiff and defendant, the taking of the deposition of John O. Baker, named in the attached notice, was continued until the hour of ten o'clock a. m., June 14th, 1887, at the place named in said notice.

Dated this 13th day of June, 1887, 10 a. m.

——— ———,
Notary Public.

Be it remembered that pursuant to the notice hereunto annexed and the adjournment heretofore had and on the 14th day of June, 1887, at Seattle, in the county of King, Territory of Washington, before me, A. C. Bowman, a notary public in and for said county and Territory, personally appeared JOHN O. BAKER, witness produced on behalf of the plaintiff in the above-entitled action, now pending in the said court, who, being by me first duly sworn, was then and there examined and interrogated by Maurice McMicken, of counsel for plaintiff, and F. M. Dudley, of counsel for defendant, and testified as follows:

(By Mr. McMICKEN:)

Q. State your name, age, residence, and occupation.

A. My name is John O. Baker; residence, Seattle; physician by occupation.

Q. How long have you been a practicing physician and surgeon?

A. Thirty-seven years. I commenced practicing in 1850. That makes it 37 years last April.

Q. How long have you practiced in Seattle?

A. 12 years.

Q. Are you acquainted with W. C. Hawthorne, the plaintiff in this case?

A. I am very well acquainted with him. I did not attend him when he was injured.

Q. How long have you known him?

A. Ever since I have been a resident of Seattle.

Q. Were you acquainted with his physical condition prior to the accident which happened him at the mill?

A. I think I never prescribed for him in my life. He was supposed to be perfectly healthy. I don't think I ever gave a single dose of medicine.

59 Q. Were you the family physician for the Hawthornes during that time?

A. Yes; about the whole time.

Q. Have you ever made an examination of Hawthorne since the injury?

A. Yes; a cursory examination. I intended always to make a more full examination before the trial came off, but I saw enough of his condition to convince me that his was a case that time would only heal, and it is probable that time never would heal. He is crippled for life—ruined for life. I believe I did prescribe some little treatment for him, but it was more to do something to satisfy his wife than in the hope of doing any good. You see there is a confusion of blood on the brain, and that blood must be absorbed before he can recover. When there is blood on the brain it must be absorbed, and in the absorption the brain is liable to be absorbed too or become permanently di*d*organized.

Q. Do you remember when that examination was made? About how long ago?

A. Oh, it was a good while after the injury—it was last fall. Mrs. Hawthorne brought him to my office once or twice, and I visited him at the house when he was a little sicker than usual.

Q. Have you ever made an examination since then? What, in your opinion as a physician, are the chances of his recovery—permanent recovery?

A. Permanent recovery? He has not any chance.

Q. Why is that?

A. There is too much disorganization inside for nature to repair. I know that people do recover in extraordinary manner sometimes, but you cannot count on it. I have seen people recover from various injuries that everybody was sure would not live three or four weeks.

Q. I wish you would state in detail, Doctor, the nature of the injury.

A. The nature of the injury was the fall of a wheel——

Mr. DUDLEY: We object. It is immaterial.

WITNESS: The hub of a wheel struck him right here (indicating left side of the head), and there has been a depressed fracture there. You can trace the size and shape of the hub of that wheel. It was one of those cast-iron wheels. You can trace the size and shape on the head, and there is one corner of it a little deeper than the other, and when you have a blow that way you have an injury done to the blood-vessels that supply the brain inside, and absorption goes on very slowly and it produces a permanent disorganization that will probably never get well—probably thickening the membranes of the brain.

Q. What effect has that had upon his nervous system?

A. Of course it would make his nervous system weak. This would bring softening of the brain or acute inflammation, according to the way it took him. You know that softening of the brain runs to absolute imbecility, and this is usually produced by plugging of some blood-vessel. When they are plugged you cannot get nourishment to the brain.

Q. How lately have you seen Mr. Hawthorne?

A. Oh, I cannot tell you. It is a long time. I saw him on the
street the last time I was out riding, but I have not
60 seen him to talk to him since the last time I was in the
house. It was a case I did not want to meddle with. I felt
it was a hopeless case, and one hates to be bothered with "How is he? What can you do with him?" I think his case is about as hopeless as my own. He may live longer than I think. Dr. Miller was the attending physician. I guess Miller and I were the only two that ever seen him. His wife wrote down to San Francisco to Dr. Lane to get an opinion.

MR. DUDLEY: We object; that is hearsay.

WITNESS; He told me afterwards that Lane's opinion was about the same as mine.

Cross-examination.

(By MR. DUDLEY:)

Q. Doctor, are you a physician or a surgeon?

A. Both.

Q. Which are your practicing most?

A. Both—general practice.

Q. Of what medical school are you a graduate?

A. Toronto.

Q. Surgical institute there?

A. There was no surgical —. They taught physic and surgery in the institution in the same class.

Q. You state you never made anything more than a cursory examination of Hawthorne?

A. Yes; I was up in Haines' office one afternoon. Hawthorne came up and wanted me to go up. I objected; but he was rather anxious, and I went up with him and made an examination of his head in the office, and still further examined when I got to the office. It don't matter about an examination of Hawthorne's head. The dam age is down deep, where you cannot see it. You can never see the mischief done except by a post-mortem examination. I can only reason from external appearances what the internal appearances are.

Q. Might not a more formal examination lead you to a different conclusion?

A. Yes; if you bore a hole in his head; not otherwise. I told Hawthorne—he was fearing epilepsy—I said if epilepsy appears I will bore a hole in your head and take a piece of bone out.

Q. Do you think the skull is fractured?

A. I cannot tell you. The bony case of the skull is made of two tablets of bone. One is called the external; the other the internal. The internal tablet is hard and brittle almost as glass and hard to cut, while the outside is soft. You often have an injury of the outer tablet which will depress the outer tablet—the spongy portion between the outer and inner. I have one on my head caused by a fall from a wagon. I did not know that it was done for two hours, not till the blood was streaming down my back. Whether the internal tablet is depressed I don't know. You can have quite a long fissure in the skull without depression. You may have a very gentle fall with a good deal of depression. I never had any talk with Miller about this case.

61 Q. You stated that time alone could cure this injury. Time may cure it?

A. I don't think it will. All that can be done has to be done by time. That is a slow process going on in the removal — the injury, that will continue a lifetime. What it would for him I could only guess, but as far as I have seen him from the time of the injury there is very little process of repair going on.

Q. You never made an examination of Hawthorne prior to the injury?

A. No; I never knew but what he was in perfect health. I am satisfied I would have known if he was not. I was the family physician and had the entire confidence of him and his wife. When the accident happened I was not at my office, so they got some one else.

Q. You did not attend him after he was injured?

A. No; I did not attend him; they got Dr. Miller and they kept him. It would not be desirable—it is rather a delicate matter to discharge a man after he has been employed in a case of that kind. Mrs. Hawthorne spoke to me about it and I recommended that they retain him. I thought it would look like discourtesy to take hold of the matter then.

Q. You say extraordinary recoveries take place. He may possible recover?

A. It is possible, but very improbable. I knew once a man have a tamping iron blown through his head, starting in at the under jaw and going out at the top of his head, and that man recovered. While if one of us was injured half as bad we would *we would* go straight to glory.

Q. May not Hawthorne prior to this injury — exhibited some trace of mental disease without your having discovered it?

A. It is possible, of course. A fellow would have to answer it was possible, but I don't believe it. I used to see Hawthorne every few days. I know the children could not look sideways but what I was up to the house. He was — man careful of his wife and family, and employed medical treatment when I myself knew that it was unnecessary.

Q. Your statement of the manner of the injury is hearsay?

A. Yes; it is hearsay, but I could almost swear that what hit him was round.

Q. Your statement as regards the physician in San Francisco is also hearsay?

A. Yes; of course it is. I spoke of that to illustrate the matter that my opinion is similar to Dr. Lane's.

Q. This San Francisco physician did not see Hawthorne?

A. No; Hawthorne told me that his wife had written to Dr. Lane, and that Dr. Lane's opinion was about like mine. I had urged the absurdity to try to attempt to cure such an injury by medical treatment and Dr. Lane gave similar advice. I think that circular mark on his head is about that large (indicating circle about two and a half inches in diameter). It is on the left side of the head. There is no indication of paralysis yet, and if the case was going on rapidly to a termination we would expect paralysis.

Q. You think the non-existence of paralysis is rather favorable?

A. Not as unfavorable as if we had paralysis.

62 (Counsel for the defendant reserved the right to object hereafter to the testimony on the grounds of materiality, relevancy, or competency. Counsel for plaintiff and defendant waived the signature of the witness to this deposition, the transcript of the short-hand notes of the notary to stand as and be the evidence of said witness.)

TERRITORY OF WASHINGTON, } *ss:*
County of King, }

I, A. C. Bowman, a notary public in and for said county, do hereby certify that the witness in the foregoing deposition named, John O. Baker, was by me duly sworn; that said deposition was then taken at the time and place mentioned in the annexed notice and adjournment, to wit, at the residence of said John O. Baker, on the west side of Third street, between Marion and Columbia streets, in the city of Seattle, county of King, and Territory of Washington, on the 14th day of June, 1887, between the hours of 10 a. m, and 5 o'clock p. m. of that day; that said deposition was reduced to writing by me and transcribed in accordance with the stipulation made by counsel for plaintiff and defendant.

In witness whereof I have hereunto subscribed my name and affixed my seal of office this 14th day of June, 1887.

—— ——,
Notary Public.

P. B. M. Miller called as a witness for the plaintiff and sworn.

(By Mr. Haines:)

Q. What is your profession, Doctor?

A. Physician and surgeon.

Q. How long have you been practicing in Seattle?

A. About five years.

Q. Are you acquainted with the plaintiff in this case, Mr. Willard C. Hawthorne?

A. I am.

Q. How long have you known him?

A. I have known him about five years, but not intimately.

Q. Were you called to attend him when he received this injury at the mill of the defendant?

A. I was.

Q. Were you acquainted with his physical condition prior to that time?

A. Well, not particularly. He was in the habit of collecting rent from me occasionally at my office; but further than the presentation of his bill and receiving payment, nothing else occurred.

Q. What was his physical condition prior to the time of receiving the injury?

A. I should regard him as one possessing ordinary health, as far as I could judge.

Q. Supposing him to have been of the age at that time of forty-five years, what would have been his reasonable expectancy of life according to the average rate of mortality? How much longer would a man in his apparent condition—a man forty-five years of age—what would have been his expectancy?

A. That would depend greatly on his family history.

63 Q. But taking the mortality tables?

A. Well, you could only base that on the family history.

Q. Do you — the average expectancy of life for a man forty-five years of age?

A. Well, according to the insurance rules, I don't know that I could come at it exactly.

Q. Could you approximate, Doctor?

A. I have made it no particular study.

Q. What time were you called to attend Mr. Hawthorne?

A. I was called on the 28th of October, 1885.

Q. Where was he at the time?

A. He was in the outhouse, a small house adjacent to the Columbia and Puget Sound saw-mill.

Q. What was his condition?

A. When I saw him he was in a state of schock resulting from the injury that he had sustained upon the head.

Q. What was the nature of that injury?

A. It was an incised wound extending from the coronal suture and running parallel with the line of the saggit-al suture, and had the shape of an inverted λ and was about four inches in length.

Q. Just indicate upon your head, Doctor, to the jury about where that wound was.

A. It ran in this direction (showing on the left side of the head).

Q. Did you make any examination to ascertain from the effect of the blow what caused the wound?

A. I came to the conclusion that it was caused by some very blunt instrument, the nature of which, of course, I had not examined.

Q. What effect did it produce on the skull?

A. It produced a fracture of the external table.

Q. Was there any other wound upon him or mark of a blow upon any other part of the body except on the head?

A. Not that I remember.

Q. How long did you attend him?

A. For nearly three weeks.

Q. How, constantly?

A. Almost.

Q. How often did you visit him?

A. For the first eight days I think I paid him two visits a day.

Q. What did you say?

A. Two visits a day for the first eight days.

Q. And after that?

A. Once a day.

Q. For how long?

A. For nearly three weeks.

Q. Have you attended him at all since then?

A. I have, on various occasions.

Q. What effect did that blow actually produce upon Mr. Hawthorne?

A. In what respect?

Q. Well, in every respect, so far as his physical condition was concerned. Did it cause any pain?

A. The immediate effect was pain, and the pain continued more or less during the whole of the time I attended him. Since then he has been complaining of pain, together with weakness and shooting pains all over the body.

Q. When did you last see Mr. Hawthorne?

A. I saw him on Saturday last.

Q. What was his condition then?

A. He was in a state of great excitement and complained of pain in the head and was unable to sit up.

64 Q. I wish you would state to the jury, Doctor, what, in your opinion as a physician, has been the effect upon Mr. Hawthorne of that blow upon the head which caused the wound which you found.

Mr. McNaught: I believe I will object to that question, your honor. That is very general.

The Court: The objection is overruled; let it be answered.

Mr. McNaught: An exception.

The Court: The exception will be noted.

A. In consequence of the fracture of the external table having been produced at the time, it is impossible to give an opinion as to what might arise from such an injury; although there was no evidence of depression of the internal table, we know that very frequently from small injuries what we call cerebral changes take place, which eventually culminate in weakness of mind and nervous prostration and in fact, a condition almost amounting to what might be called paralysis, although not paralysis proper.

Q. Has it produced any effect upon Mr. Hawthorne, so far as his ability to perform manual labor is concerned?

A. We can only observe that from subjective symptoms.

Q. Yes, that is what I mean—from what you observed.

A. I observe that he has become indolent; that he has lost all enthusiasm; that he is weak and unable to move about; that his memory has failed him, and all the evidences of cerebral trouble, so far as subjective symptoms are concerned.

Q. How has his condition been in that respect since he first commenced to get around? Has he improved or grown worse?

A. No; they have not improved.

Q. When did you last see him, Doctor?

A. S*ta*urday.

Q. When was the last time that you saw him before that?

A. On Friday. I think on last Friday.

Q. He was very excitable at that time; very much excited?

A. He was.

Q. Within what time before that had you seen him before you found him suffering from this excitement?

A. I saw him about a week before that.

Q. About a week?

A. Yes.

Q. Well, now, what was his condition then? How did it seem to be compared with what it was along last winter?

A. His condition seemed to be about the same, except he complained of more pain in the back of the head.

Q. And when he first got so as that he could get around, when was that?

A. I think he was confined to the house for nearly—that I could not say positively, because after I had finished my surgical work, and concluding that his condition was fair, I paid him no more visits until I was called subsequently on, I think, two or three occasions, and his condition was not satisfactory; he did not improve any during the whole of the time.

65 Q. How did his condition compare the last time you saw him, when he was suffering under this excitement, with his condition a year before that?

A. I think he is very much weaker.

Q. What is your opinion, Doctor, as regards the probability of his recovery from that?

A. As I said before, it is impossible to give a positive statement in that respect.

Q. Well, I want to get your opinion as regards (interrupted)——

A. For the reason that very frequently injuries of a very slight character produce, sometimes, cerebral changes. That does not occur in ever- instance; lesions of the brain.

Q. What I want to get at, Doctor, is your opinion of his case as to the probability of his recovery.

A. Well, basing my supposition on the facts, I should say that his chances of recovery are not good.

Q. And how as regards the probability of his being able to perform manual labor again, in your judgment?

A. My answer should be the same in that case. He would be, certainly, perfectly incompetent to perform manual labor.

(By Mr. HAINES:)

Q. You saw him last Friday, you say?

A. Yes, sir.

Q. Describe to the jury his condition at that time.

Q. He was in a state of great mental agitation; complained of a great pain in his head and a convulsive movement, together with apparent unconsciousness.

Q. And when you saw him on Saturday what was his condition?

A. It was improved.

Q. What do you say?

A. He was considerably improved, with the exception that he was very weak.

Q. What was the reasonable value of the medical services rendered by you to Mr. Hawthorne during his sickness?

A. Well, my bill should have been $90, but I believe I tendered him a bill for sixty.

Q. Has that been paid?

A. Part of it.

Q. What part?

A. Forty dollars.

Cross-examination.

(By Mr. McNAUGHT:)

Q. Doctor, you never examined Mr. Hawthorne in any respect concerning his physical condition prior to that time of the injury?

A. Sir?

Q. You never examined to ascertain his physical condition prior to the time of the injury to the plaintiff in this case?

A. No, sir.

Q. He called upon you once every month prior to that time to collect his rent?

A. No, sir.

Q. How often?

A. Very frequently his wife called; sometimes his cousin called. I saw him, on an average, about every three or four months.

Q. So that you know nothing of his physical condition prior to that time except appearances?

A. That is all, sir.

Q. Now, when you examined him at the time of the injury and soon after, you say that you discovered a fracture of the outer table, but no fracture of the inner table?

66 A. Very often we cannot ascertain from the fact that the symptoms of the compression are not always made manifest, even if it showed fracture of the internal table.

Q. You have examined his head recently?

A. Yes, sir.

Q. Are there evidences now, Doctor, of that fracture?

A. I am not sure; did not examine particularly.

Q. Was there any reason at that time why an examination could not be made of his head?

A. No reason; but it would be a very difficult thing to determine whether a fracture had occurred two years ago or not.

Q. There is no reason why an examination should not be made of it at this time that you know of?

A. There is no reason why it should not be made; but there is every reason why they could not be able to ascertain whether one existed or not.

Q. Were you there this morning when his head was examined by Drs. Smith and Smart and Minor?

A. I was not.

Q. Did you give any instructions, Doctor, that his head should not be examined by the medical experts that were sent there for that purpose?

A. Never, sir.

Q. Then whatever was done concerning that was not done under your advice nor direction?

A. No, sir.

Q. How many times, Doctor, have you been called to treat Mr. Hawthorne since the expiration of the three weeks which you have spoken of which you attended him on account of this injury?

A. Probably seven or eight times.

Q. Now, why were you called each time? What was the particular symptom on each of these visits?

A. Well, the main object, I believe, was on account of his not making any improvement. His complaints were constant, and there being no improvement they called upon me to see if there was any way by which the conditions could be improved or ameliorated.

Q. During each of these visits did you make any general, or on any one of these visits did you make any general, examination to ascertain whether there were any other troubles?

A. Yes, sir.

Q. What examination did you make, Doctor?

A. Simply an ordinary physical examination.

Q. What did you find?

A. Found nothing abnormal to exist.

Q. When did you examine him the last time, Doctor—how long ago?

A. A physical?

Q. Yes.

A. Within the last month; I have forgotten the time.

Q. During this examination you found no other particular trouble or ailment save that arising from the injury?

A. No, sir; I did not discover any.

Q. Did not discover any?

A. No, sir.

Q. Did you examine, Doctor, carefully to ascertain whether there were any troubles of the heart?

A. I did not within the last month.

Q. Well, did you at any time make any careful examination to ascertain whether there was or not any serious heart trouble—organic trouble?

67 A. Some months since, but there was none then. It may have been over a year since I examined him, and there was no evidence at that time.

Q. Has he made any complaint, Doctor, to you of numbness of his limbis?

A. He has complained of that. It seems they come on occasionally; they don't always remain there.

Q. They only come on occasionally?

A. Yes; it was not persistent. He did not complain of it persistently.

Q. How often has he complained of that numbness?

A. Well, I should not say on every occasion I saw him, more or less.

Q. Has he often and always complained of dizziness of the head?

A. Almost always.

Q. Is there any paralysis of either side?

A. No, sir.

Q. No paralysis at all?

A. No, sir.

Q. Did you observe any indications of concussion of the brain?

A. None, except from the effects of the injury. Directly when the injury took place of course there was evidence of it, or rather of the shock.

Q. Now, Doctor, if the internal table was fractured, so that the injury would probably be permanent, at this time would there not be evidence of paralysis?

A. Not necessarily.

Q. Not necessarily?

A. No, sir.

Q. Well, usually would there not be?

A. It is a condition that is very frequently expected.

Q. And does it not usually follow?

A. No; not usually.

Q. But ordinarily it would be expected?

A. Yes.

Q. If there is concussion of the brain, Dr., what are the sy toms?

A. The symptoms of a shock—that is, a quick and distinct a perspiration stands out on the forehead, and complete unconsciousness—a stupor or unconsciousness.

Q. Now, have you treated him for anything else than the injury complained of?

A. No, sir.

Q. What kind of medicines have you prescribed for him?

A. I have given very little medicine of any kind, except tonic.

Q. Suppose, Doctor, that he had heart disease; that there was evidence of organic heart disease at this time, would that have any connection with this injury?

A. Taking it as a fact that that did not exist when I examined him, it could have very little effect on cardiac trouble or heart trouble making its appearance subsequent.

Q. It would then arise, if it had existed at this time, from some independent cause?

A. Yes.

Q. What are usually the causes of heart disease?

A. Rheumatism.

Q. Anything else?

A. That principally. Then we have the various pathological conditions that determine in that way, such as calicfication, fatty degeneration, etc.

Q. Did you observe at any time when treating him after the expiration of the three weeks that there was very poor circulation?

A. No, sir.

Q. Did he complain at any time of coldness of his hands—numbness of his hands and arms?

68 A. Yes; he complained of that, but the circulation was good.

Q. Do you know to what extent, if he has taken outdoor exercise since the accident?

A. Very little, I believe.

Q. Do you know of his going out to his farm in the country during that time?

A. No, sir.

Q. Are you still living in his house, Doctor?

A. No, sir.

Q. He is not coming around to collect rents now?

A. No, sir.

Q. Now, as to whether the injury is permanent, if I understand your evidence correctly, it is a question you cannot answer difinitely?

A. No, sir.

Q. Was Friday the first time that you observed dizziness and that he was excitable since the injury?

A. That is the first time that I was able to observe it myself. vious to that he complained of it himself. There is certain sub- ve symproms that a patient will suffer from that are not made

he condition in which you found him on Friday and Satur- ht that not be the result of heart disease at this time?

A. Might be.

Q. They were such symptoms as you would expect in such a case, are they not? Serious heart disease—organic?

A. Many of them.

Q. You say, Doctor, that you presented your bill for sixty dollars, and that it ought to have been ninety?

A. Yes, sir.

Q. Why did you not present your bill for the full amount?

A. Because I believed it was very little use to present it. I did not know that he had any property or that I could collect it.

Q. Did you not know that he had a farm out here near town, Doctor?

A. No, sir. I knew that he had a house, but that the house did not belong to him. It belongs to his daughter, I believe.

Q. Did you not know that they had property up where you used to live?

A. That is the property I speak of.

Q. Now, is that property in his daughter's name or in his wife's name?

A. I could not say which.

Q. You could not say which that is?

A. No, sir.

Q. So really you did not know anything about his financial condition?

A. No.

Mr. McNaught: That is all.

Redirect examination.

(By Mr. Haines:)

Q. In the course of your treatment of Mr. Hawthorne, have you seen anything that, in your judgment, indicated the presence of heart disease?

A. I did not.

Recross-examination.

(By McNaught:)

Q. You did not make any examination for that?

A. The pulse would reveal that.

69 Q. You say that you did not make any examination within a year to ascertain?

A. No; but the last time I was called there I took his pulse, and it was regular. If there was cardiac trouble, it must be so slight that it would not affact his organism in any particular way.

Q. That is your opinion as it stands, not having made a particular examination for that purpose?

A. Well, I judge from the condition of the pulse—that is, f my last examination.

Q. And when was that last examination made?

A. Last Saturday.

Q. That is the only thing you judge from ?
A. That is all.
Q. But you might be mistaken ?
A. There are certain conditions of the heart; there may be more or less atrophy of the heart, yet atrophy of the heart does not always mean a very bad state of heart disease. You may frequently find slight troubles—an intermittent pulse. The pulse would indicate disease of the heart.

Mr. McNaught: That is all.

Mr. Haines: Do you know, Doctor, the cause what lead to the condition that you found him in last Friday ?
A. I was informed that they made an effort to get to the court-house.

Mr. McNaught: I think that is not material.
Mr. Haines: It will only show what entered into consideration in making up his opinion at that time.

Mrs. Hawthorne, wife of plaintiff, after being duly sworn, testified as follows:

(Mr. Haines:)

Q. Are you the wife of the plaintiff in this case ?
A. Yes, sir.

Mr. McNaught: We object to her testifying.
Mr. Haines: She is a competent witness with the consent of her husband.
The Court: What is your objection ?
Mr. McNaught: That she is the wife of the plaintiff.
The Court: The objection is overruled. An exception is allowed.

Q. Mrs. Hawthorne, where were you when your husband received the injury that is the subject of this litigation here ?
A. On the morning when he received it I was at home.
Q. How long have you been acquainted with Mr. Hawthorne ?
A. Thirteen years.
Q. How long have you been married to him ?
A. Eleven years.
Q. What was his physical condition as regards strength and ability to work prior to the time he received this injury ?
A. Up to the time that he received the injury I have never known him to be sick or make any complaint of any pain or trouble.
Q. And how as regards his ability to work ?
A. I have understood from those who have employed him that he was perfectly capable of doing a full day's work.
70 Q. How as regards breathing, for instance, in going up hill or under exertion ?
A. Never had any trouble with regard to anything of that kind.
What business has Mr. Hawthorne been engaged in up to the
f his injury since you have known him ?

A. He has been milling, working at lumbering, or carpentering the last six years.

Q. And prior to that what was he doing?

A. He was in the army.

Q. How many years was he in the army?

A. I don't remember exactly what length of time.

Q. Now, I wish you would tell the jury about what time it was that Mr. Hawthorne was brought to the house.

A. It was about the time that the university bell rang for half past eight in the morning. I noticed the ringing of the bell.

Q. What was his condition at that time?

A. He was insensible, because he made no motion whatever except when moved or some pain brought on.

Q. How long did he continue in that condition?

A. Until, I should judge, about ten o'clock—nine or ten o'clock—the next forenoon.

Q. Did he seem to be suffering any pain?

A. He complained not so very much of his head during the early portion of the night, but towards morning and during the forenoon he complained of his head.

Q. How long was he confined to his bed, Mrs. Hawthorne?

A. He attempted to sit up in two or three weeks, but failed, and by over-exertion I think it probably caused him to keep his bed a little longer than he would. It was about five weeks before we could bring him to the outside room.

Q. Did he suffer any pain during that time he was confined?

A. Intensely, almost all the time.

Q. And how as regards ability to sleep?

Q. During the first portion of his sickness we gave him some opiates; not very largely, however. He would be unable to sleep, and then we would give him something of that kind if we found it absolutely necessary.

Q. Where did the pain seem to be located?

A. In the head and left side—left shoulder.

Q. After he got out of bed how long was it before he could walk around?

A. I think it must have been fully two months. I don't remember exactly as to that.

Q. What has been his condition since that time and down to the present time since he got so that he could walk around?

A. Well, he has been unable to work.

Q. And how as regards pain? Has he suffered any pain?

A. Every fifteen or twenty minutes he has suffered pain in his head.

Q. What have you been accustomed to do when he has suffered with pains in his head?

A. Mostly to use cold water on his head.

Q. How frequently have you had to make this applicatio

71 A. More particularly when he had been excited or bec
nervous the head would become very hot.

Q. What degree of attention did he require while he was sick in bed—how constantly?

A. It was constant.

Q. Day and night?

A. Yes, sir.

Q. Since that time what degree of attention has he required—since he got so he could walk?

A. He has not required so very much attention. He required to be kept quiet more than anything else.

Q. Has he worked any since the time of his injury down to the present time?

A. He sawed a little wood sometimes. He has worked a little in the garden—just merely worked ten or fifteen minutes at a time.

Q. How much wood has he sawed since the injury?

A. Very little.

Q. How long ago?

A. Well, he has been sawing—he would saw a few minutes at a time during the last year.

Q. Something was said about his having some land out in the country?

A. He has a little piece of wild land out about—I don't know the exact distance from town—perhaps two or three miles from our home.

Q. How much land is there there?

A. Ten acres.

Q. Has he been out there since he was injured?

A. Once.

Q. How did he go?

A. I had a carriage and rode out. We were gone about four hours, I judge.

Q. Did he do any work?

A. No.

Q. Was he able to?

A. No, sir.

Q. Has he done any work, except what you have mentioned?

A. Except this little work about the house.

Q. Has he been out to the farm at any other time except the time you went?

A. No, sir.

Q. What effect does noise have upon him?

A. It makes him very nervous and causes his head to become very hot.

Q. And what is it necessary to do when his head becomes hot?

A. To cool it with cool water or ice water.

Q. Were you with him last Friday when he attempted to come to the court-house?

A. Yes, sir.

Q. State what the effect upon him was—his attempt to get doen

McNaught: We object. It is immaterial. It took place
e commencement of this suit.

The COURT: The witness may state, if she knows.

Mr. McNAUGHT: We will save an exception.

The COURT: Exception allowed.

A. I think we were unnecessarily hurried. We supposed we must be down here within half an hour and he attempted to walk down here very fast, because I did not have time to get a conveyance. The heat of the sun and feeling that he must be here—he walked very fast—and attempting to caused him to become dizzy—more dizziness than fainting.

Q. Did he walk all the way?

A. No, sir.

Q. How much of the distance did he walk?

A. To the corner that Mr. Young lives on—A. B. Young lives on—corner of Fourth——

Q. What conveyance did you get?

72 A. I met one of these express wagons, and asked the driver to bring us down.

Q. Whereabouts were you living then?

A. On the corner of Sixth and Union.

Q. What has his condition been since then as compared to what it was before?

A. I don't think he has been quite as strong as he was before since that time.

Q. What other symptoms have you noticed about Mr. Hawthorn since his injury except those that you have mentioned?

A. I don't recollect any.

Q. Who sent for Doctor Miller when he came Friday? I want to know whether it was at your request.

A. I requested—I imagine Mr. Gorham may have telephoned.

Q. It was at your request?

A. Yes; my request.

Cross-examination.

(By Mr. McNAUGHT:)

Q. Mrs. Hawthorne, you say that he is easily excited? How long have you noticed that condition?

A. Since he was hurt.

Q. Have you observed it increasing?

A. Not if he is in ordinary health he has been in during the last year. I don't know I could say it was increasing. It has been about the same.

Q. How is he about getting his breath—easily or otherwise—when moving about?

A. I never noticed that he had any difficulty about that.

Q. Do you notice that he suffers any from dizziness whatever?

A. He becomes dizzy if his head is heated.

Q. If he moves around a little he gets excited?

A. Yes; if he attempts to walk as he did last Friday.

Q. And then he complains of pain in the head?

A. He always has pain in the head.

Q. Always complains of that? Does he complain of having poor eyesight or *dizziness* of vision?

A. Yes; his eyes have been affected since he was hurt.

Q. He complains of dimness of vision?

A. Sometimes sees but half of a thing.

Q. Does he not complain most of the time of dimness of vision?

A. No, sir; just occasionally.

Q. When he complains of dizziness of the head, then he complains of dimness of vision?

A. Yes, sir.

Q. You were at the house this morning when Doctor- Smith, Smart, and Minor came there to examine him?

A. Yes, sir.

Q. You refused to permit them to examine his head?

A. No, sir; I did not.

Q. What did you say?

A. I said they must not cause him pain. I considered it unnecessary to have his head knocked or tested—that is, to cause him any unnecessary pain.

Q. Well, you told him not to examine his head?

A. No, sir.

Q. Not to touch his head?

A. I told them not to strike it or in any way hurt him. My idea was not to cause him pain.

Q. Did you not tell him not to touch his head?

A. No, sir.

Q. You testify to their examination there this morning while in your house in the presence of yourself and husband there 73 and in the presence of them that you did not say to them not to touch his head?

A. No, sir; not as far as touching his head, but I wanted them to touch it lightly and not to cause him pain. That was my whole idea.

Q. Did you not put your finger on one place and tell them not to touch it there?

A. I would prefer that they should not. There was but one place, however.

Q. How is his appetite, Mrs. Hawthorne?

A. Sometimes quite good and then poor.

Q. Now, you say that he has a piece of wild land out here a short distance from town. Is not that cultivated property—a portion of it?

A. There is about three acres indifferently cultivated. They have not done anything with that this year. It was rented last year.

Q. You say he sometimes works in the garden and saws wood?

A. Yes, sir.

Q. Have you had any other physician attend him except Dr. ller?

. Dr. Baker has been our family physician about seven years.

How many times did Dr. Baker examine him after the injury?

Maybe three times. I am not positive as to the number.

Q. When was the last examination made by Dr. Baker?

A. If you wish the month I could not give it. It was this last spring.

Q. This spring?

A. It may have been in March or April or May. It was one of them. It was about that time. I don't remember the exact month.

Q. On which side of the head was the injury?

A. The left side of the head.

Q. And the pain in the shoulder is on the left side?

A. He has no pain; complains of no pain in the shoulder, particularly at the present time; but the pain in his head starts from the point and comes through his temples; then through the back of the head to the base of the head.

Q. On the left side?

A. Yes. I think from his complaint I should judge the head is in pain all over. I don't think it is particularly on the left side.

Q. You say he complains of pains in his body?

A. In his legs; a weakness of his legs.

Q. Any other portion of the body?

A. No, sir.

Q. He complains of numbness of the limbs a good deal, does he not?

A. No, sir; not numbness.

Q. Does he complain of any want of circulation of the blood in the limbs—coldness of his feet and hands?

A. I don't know that he has complained particularly of coldness or numbness.

Mr. McNaught: That is all.

Redirect examination.

(By Mr. Haines:)

Q. You stated, in answer to Mr. McNaught's question, that there was a certain place on his head that you preferred them not to touch.

A. Because it caused him pain.

74 Q. To what extent does touching that place cause pain?

A. It seems to affect his eyes and cause him to suffer pain. I did not wish them to interfere because I thought it unnecessary to cause him that amount of suffering to-day.

Q. Do you know at whose instance the physicians came there?

A. No, sir.

Q. You did not send for them?

A. No, sir.

Q. In regard to the plaintiff's weakness in his legs, did you ever know, before the injury, of his making complaints of that sort?

A. No, sir.

Mr. Haines: That is all.

Mr. McNaught: You were informed that these physicians coming before they arrived?

A. A little while before they came.

Q. You knew they were coming to examine him?
A. Yes, sir.

Mr. S. F. Tichener, a witness called on behalf of the plaintiff, after being first duly sworn, testified as follows:

(By Mr. Haines:)

Q. State your name.
A. S. F. Tichner.
Q. What is your business?
A. Carpenter.
Q. Are you acquainted with Mr. Hawthorne, the plaintiff in this case?
A. Yes, sir.
Q. How long have you known him?
A. Seven or eight years—six or seven; somewhere along there.
Q. Where were you at the time he received this injury that this suit was brought concerning?
A. At the time he received it?
Q. Hurt in the mill.
A. I was there near the mill office.
Q. What were you doing?
A. I went down there on business.
Q. Did you see the pulley fall?
A. No, sir.
Q. Did you see the pulley at any time after it fell?
A. Yes, sir.
Q. Just tell what you did with the pulley, if anything.
A. The pulley laid, I think, on a platform on the cars. I took the pulley up; kind of lifted it.
Q. How heavy was it?
A. From seventy-five to eighty pounds.
Q. Did you notice anything regarding the position and condition as far as oil is concerned?
A. I noticed that I got my hand greasy when I got through looking at it.
Q. To what extent did you get your hands greasy?
A. Considerable extent; considerable grease on them.
Q. Do you know where that grease came from?
A. No, sir; I know it came from the pulley.
Q. What part of the pulley?
A. I don't know.
Q. Did you ever work with Mr. Hawthorne?
A. Yes, sir.
Q. Do you know, prior to the accident, what his ability was to work?
A. It was good.
Q. And how was he, apparently, as regards strength?
A man of common strength.
What work was he engaged in when you worked with him?
Carpenter work.

Q. How long ago was that?
A. Some three or four years.

75 W. C. HAWTHORNE, plaintiff, after being duly sworn, testified as follows:

(By Mr. HAINES:)

Q. Are you plaintiff in this action?
A. Yes, sir.
Q. How old are you, Mr. Hawthorne?
A. I'll be forty-seven the 28th of August.
Q. What has been you- business, Mr. Hawthorne, since you became a man grown?
A. Well, I was raised on a farm, and at the war I went into the war.
Q. When did you go into the war?
A. I think it was in 1864.
Q. How long were you in the army?
A. One year.
Q. After leaving the army what business did you go into?
A. I was in the lumber business.
Q. Whereabouts?
A. On Puget sound.
Q. How many years were you in the lumber business up to the time you were injured?
A. About seven or eight years.
Q. What business did you do—what do you mean?
A. Well, I was carpenter and worked around lumber.
Q. You were working in the Columbia and Puget Sound saw-mill when you were injured, were you not?
A. Yes, sir.
Q. What were you doing there?
A. When I was injured I was running the trimmer.
Q. How long did you run the trimmer at the time of your injury?
A. I think it is about ten or eleven days.
Q. How long had you been in the employ of the company before that—how long had you been working there?
A. About a month and a half, I think.
Q. What were you doing before you ran the trimmer?
A. I was on the slab car and worked around carpentering in the mill when the mill was shut down.
Q. What wages were you receiving as carpenter?

Mr. MCNAUGHT: We object for the same reasons.
The COURT: Objection overruled. An exception allowed. You may answer.

A. I think I was receiving two dollars a day.
Q. Did you understand anything about running a trimmer?

Mr. MCNAUGHT: We object.

The COURT: Objection overruled. The witness may answer. Exception allowed.

A. Well, no, sir. I don't know that I really understood it.

Q. Had you ever run a trimmer before?

A. Yes; I had, some.

Q. Whereabouts?

A. In Seabeck.

Q. Was this trimmer constructed the same as the trimmer you ran in Seabeck?

A. No, sir.

Q. How was that you ran in Seabeck made—how was it constructed?

A. That was slung down even with the floor and it came up through the floor. The saw came up and went back.

Q. Do you know, prior to the time of the accident, before you received the injury, how the pulley was fastened on the shaft?

Mr. McNAUGHT: We object for several reasons. It is shown by all their own witnesses that the pulley was what they call a
76 revolving pulley and that it was visible to the naked eye;
that any person could see it if it was in a dangerous condition. That is what the law calls a seen danger. It was not concealed, and the witness operating that machine was bound to use ordinary care in attempting to use it, and he was bound to use his eyes; besides that, they have presented by their own witness, Mr. Spencer, the fact that on the morning of the accident and prior to the accident this plaintiff was notified that the pulley was in a bad condition and liable to come down, and that they cannot now impeach their own witnesses.

The COURT: Objection overruled. An exception noted. The witness may answer.

Q. I will ask you if you know how this pulley was fastened on the shaft before the accident occurred—that is, how it was kept on the shaft or how fastened?

Mr. McNAUGHT: The same objection.

The COURT: Note the same ruling and exception.

A. Yes; kept on by a nut.

Q. Do you know which way that nut turned?

A. Well, I was told (I did not know any further than what I was told) that when the pulley turned it turned the nut on.

Q. Did you have anything to do with oiling this pulley?

A. Yes, sir.

Q. How often were you accustomed to oil it—the pulley or the shaft?

A. Oil it three or four times a day.

Q. How was it oiled?

A. There was a hole in through this nut, and the oil-can was
k through the hole, and the oil was put through into the shaft.

What was done, if anything, towards keeping the oil in the

A. Well, I always had a plug and put into this hole after I put the oil in to keep the oil from running out.

Q. What time did you go to work on the morning of the day that you were hurt?

A. Seven o'clock.

Q. How long after you went to work was it that you received the injury?

A. I could not tell; it was not a great while.

Q. Did you have any conversation with anybody that morning about the condition of that trimmer or pulley as to whether it was dangerous or not?

Mr. McNaught: We object. Unless he proposes to prove a conversation that was had with some superintendent or officer of the company, it is not material.

The Court: The answer to that question will be a preliminary one. It could not injure any one. He could answer yes or no. He is not asked to state the conversation. That question he may answer.

Mr. McNaught: We will save an exception.

The Court: Exception allowed.

Q. State whether any one did or did not tell you anything in regard to the condition of that pulley or trimmer before the accident.

Mr. McNaught: We object. They are trying to impeach their own witness.

77 The Court: Without getting into a mistake about that witness, that was a question asked on cross-examination and answered.

Mr. McNaught: It was first asked on cross-examination and then on redirect examination. (After further argument by counsel)——

The Court: Objection overruled. An exception allowed. The witness may answer.

(Question read.)

A. No, sir; I don't think any one told me.

Q. On the morning that the accident occurred, state whether any one did or did not warn you against using the trimmer.

A. No, sir.

Mr. McNaught: We object.

The Court: The same objection, ruling, and exception.

Q. State whether you did or did not oil the trimmer that morning before the accident.

A. Yes, sir.

Q. In the usual manner?

A. Yes, sir.

Q. State if you noticed anything unusual in the condition of t trimmer and the way it run that morning.

A. No, sir; I did not.

Q. Now, Mr. Hawthorne, I wish you would describe to th briefly as you can, what you know about that accident—just how it occurred, as far as you know anything about it.

A. You mean——

Q. Just how it happened—what occurred, what took place that morning?

A. Well, I was sawing fence posts; that I was doing. I think they were six by six or five by six, I would not say which. The big saw cut it into small timber, and I think there was two or three left over night in front of my saw, and I had started to saw fence posts, and that is all I know about it.

Q. How long was it before you came to consciousness? Where were you when you became conscious?

A. I was at my home.

Q. What was your state of health, Mr. Hawthorne, before you received the injury?

A. My health was always good, very good.

Q. How about your ability to work?

A. I was always able to work; I was always strong and healthy.

Q. Ever have any trouble from dizziness or shortness of breath?

A. None at all.

Q. You were in the army a year, you say?

A. Yes, sir.

Q. Were you in any exciting scenes during that time?

A. Yes, sir.

Q. Any battles?

A. Yes, sir.

Q. What battles were you in?

A. Fort Donaldson.

Mr. McNaught: We object.

The Court: I don't see that it is material.

Mr. Haines: It seems that they have learned now for the first time of some symptoms of heart disease.

The Court: That is affirmative; we won't rebut that until we have some evidence.

Mr. Haines: I thought I would ask it while he was on the stand, as he may not be able to be again on the stand.

78 Q. Since that time, Mr. Hawthorne, what has been your condition since the injury?

A. Since I was hurt?

Q. Yes.

A. I have been almost helpless.

Q. What work have you done since you were hurt?

A. No work whatever; only chore around the house.

Q. Had you ever done any work on this land you have in the ountry?

A. No, sir. My wife got a team, I think, last summer, and gave a ride out there.

Have you suffered any pain since you got out of bed?

h, yes; in pain all the time.

here is the pain located?

A. In my head; right in there, ranging down back of my head (indicating top and back of head).

Q. Is that where the wheel struck you?

A. Yes; there is a scar there and a circle there (indicating).

Q. How severe is that pain? Is it severe or otherwise?

A. Well, there is a numb pain always, but it comes more severe at times, and shoots down and runs along over my eyes and through my temples.

Q. How has your appetite been since?

A. Sometimes it has been very good, but on the average it has been poor.

Q. How about your ability to sleep?

A. Well, I sleep too sound; I sleep like a log.

Q. How has your condition been for the last year—improving or not?

A. No, sir.

Q. Continued the same, the pain getting——

A. (Interrupting.) Just the same.

Q. Do you have any difficulty in walking?

A. I do; yes, sir.

Q. Did you have any such difficulty before the injury?

A. No, sir.

Q. Did you make any special exertions on last Friday?

A. Yes, sir; I did. Last Friday, was it?

Q. The time you attempted to come to the court-house?

A. Yes, sir.

Q. And what was the effect of that exertion—what effect did it produce upon you?

A. Well, it took my strength all away, and my nervous system was all shattered. I can hardly express what condition I was in.

Q. Well, you were worse then than you were before?

A. Yes, sir.

(End of direct examination.)

Cross-examination.

(By Mr. McNaught:)

Q. Mr. Hawthorne, you say that you don't know much about machinery or running a trimmer when you commenced work in this mill of the defendant?

A. No, sir.

Q. That you never had run a trimmer like this before?

A. No, sir.

Q. That there was a difference between this trimmer and the one you was running at Seabeck?

A. Yes, sir.

Q. What was the difference?

A. This trimmer is slung overhead. It is swung from the and the saw-frame run down, while the other one came up thr the floor.

79 Q. Is there any difference in the pulleys?

A. Yes; I believe there was.

Q. What was the difference?

A. I think the Seabeck pulley was a large wooden pulley drove right onto the drum of the arm that the saw was on.

Q. Did you ever examine these pulleys on the trimmer in this mill?

A. No, sir; merely went up to oil them. That is all.

Q. Did you know they were revolving pulleys?

A. Yes, sir.

Q. You knew they were loose pulleys?

A. Yes, sir.

Q. You say you have some pain in the head. Is that constant?

A. Yes; that is constant.

Q. Dull pain?

A. Yes, sir.

Q. Do you ever have it in any other portion of the body?

A. No, sir.

Q. No pain at all in any other portion of the body?

A. No, sir; only my legs. I am troubled with my legs and hands, and there is a severe ache and numbness of the left side, and there is pain in my limbs; a severe ache all the time.

Mr. McNaught: I would like for Mrs. Hawthorne to sit farther away and not speak to the witness while on the stand.

Q. Do you have any pain, then, in your feet?

A. No, sir.

Q. Any numbness in your feet?

A. No, sir.

Q. How are your feet and the lower part of your limbs, warm or cold?

A. My left foot is cold.

Q. The other is warm?

A. Yes, sir.

Q. How is it as to your left hand?

A. My left hand seems to be all right.

Q. How is it as to your right hand?

A. This bother- me a great deal with numbness.

Q. That is in your right hand?

A. That is in my left hand.

Q. Then your left hand is cold and numb and your left foot?

A. Well, my foot is not so cold as it is numbness.

Q. What is that, paralysis?

A. I don't know, sir.

Q. Have you any pain in any other portion of your body except your head and arm and legs?

A. No, sir; I don't mean to say that I had pain in my arm; only umbness.

Q. Have you got the use of that hand?

I have got the use of one. It is hard for me to clasp anything.

nts to let go.

hat is, in your left hand only?

A. Yes, sir.

Q. Is there any soreness in your head now, Mr. Hawthorne?

A. Yes, sir.

Q. Which side?

A. A little to the left.

Q. A little to the left?

A. Ues, sir.

Q. What portion of the head is the soreness?

A. Right along there (indicating the top of the head) and runs down like that.

Q. Has that been so all the time since the injury?

A. Yes, sir.

Q. How is it as to dizziness of your head? Are you dizzy at times?

A. Well, I don't, but I get dizzy at times. There seems to be a cloud pass over my eyes, and things become dark, and I cannot see at times. The upper part of my eyes are all dark and the upper sight of my eye is dark and the lower sight is all quivering.

Q. You are troubled a good bit by that dimness of vision?

A. Yes, sir.

Q. How are you now as to being more excitable than in years past?

A. Yes; I am much more.

Q. How is your appetite?

A. It is not very good.

Q. Better at times than others?

A. Yes, sir; it is kind of changeable, but most of the time it is not very good.

Q. How long has it been since you did any work, Mr. Hawthorne?

A. I have not done any work since the injury.

Q. That is, no work at all.

A. Well, I chored a little around the house; fed the chickens and brought in a little wood or something like that.

Q. Attended to your garden?

A. No, sir.

Q. Have you worked any in the garden?

A. Worked there. My wife hired a man, and I go out and scratch a few weeds.

Q. You say you have been out to your farm only once since the injury?

A. That is all, sir.

Q. Went out in a buggy at that time, or carriage?

A. Yes, sir.

Q. How far is it from here to your house where you resided last Saturday and reside now?

A. It is on the corner of Union and Sixth street-. I could really tell how far it was.

Q. You started to walk from there down here last Saturday

A. Yes, sir.

Q. What portion of the way did you walk?

A. I should judge it was half the distance.
Q. And then you found a carriage coming to meet you?
A. An express wagon came along, and my wife came with me.
Q. You got the express wagon?
A. Yes, sir.

Redirect examination.

(By Mr. HAINES:)

Q. How did you get down to-day? Did you walk?
A. No, sir; I came in a carriage.
Q. This trouble about this pain in your head—did you have that before the injury?
A. No, sir.
Q. This pain in your limbs—did you have that before the injury?
A. No, sir.
Q. And the dimness of vision—were you troubled with that before the injury?
A. Not at all.

Mr. HAINES: I would like permission to introduce my witness in the morning. With that exception we rest.

Mr. McNAUGHT: We have no objection if the court will adjourn until to-morrow.

Mr. HAINES: Mr. McNaught knows the point.

Mr. McNAUGHT: I prefer them to close their case.

The COURT: Call the witness at the door. (Witness called, but no answer.)

The COURT: Have you any further testimony, Mr. Haines?

Mr. HAINES: None, your honor.

Mr. McNAUGHT: We move the court for a nonsuit. I have sent for my authorities.

81 The plaintiff must prove, in order to recover in this case, that the machine in controversy was defective and that the defendant knew it; that the plaintiff had no knowledge of the defective condition of the machinery or the means of knowledge. The fifth averment of the complaint is that said plaintiff had no knowledge or notice or means of knowledge or notice or the unsafe, defective, and insecure condition of said trimmer or of the said machinery or apparatus until he received the injury hereinafter mentioned. In the sixth paragraph of the complaint it is averred (reading same). The testimony concerning the dangerous condition of the machinery is involved in that of A. P. Spaulding and a few experts who were called afterwards. Mr. Spaulding testified that he had charge of this mill for, I believe, six years; that he had worked there in every capacity; that he had been in the mill six years; at for a long time he was foreman of the mill. He describes the mmer in question as being one of unusual structure, but expressly in his testimony in several places that he always considered achine safe if kept babbitted and oiled.

Willard, witness for the plaintiff, came into the court-room.)

l.

The Court: Has your witness come, Mr. Haines?
Mr. Haines: Yes; your honor.
Mr. McNaught: I supposed that he had rested his case.
The Court: He had; but I will allow him to call the witness.

Dr. Willard, for plaintiff.

(By Mr. Haines:)

Q. You are a practicing physician and surgeon?
A. Yes, sir.
Q. How long have you been such?
A. Thirty-six years.
Q. Are you a graduate of any medical institution or college?
A. Yes, sir.
Q. What college?
A. University of New York and Bell-vue Medical College.
Q. Are you acquainted with the statistics or results of statistics in regard to the average duration of human life?
A. I am, sir.
Q. In what manner did you become acquainted with these statistics?
A. By examining them—persons applying for life insurance—and being acquainted.
Q. Upon what are these tables based?
A. Upon the ordinary mortality.
Q. How accurate have these tables been demonstrated to be?
A. Well, fairly accurate; so that you can determine the expectancy with a fair degree of accuracy.
Q. Is the business of life insurance based upon these tables?
A. Yes, sir.
Q. What is the average expectancy of life of a healty man 45 years of age?

Mr. McNaught: I will object, if your honor please, as immaterial and not proper testimony—not the best evidence.
The Court: Objection overruled.
Mr. McNaught: I will save an exception.
82 The Court: Exception allowed.

A. 23 years in the United States.

(Plaintiff rested. Continuation of argument of Mr. McNaught on motion for a nonsuit.)

And after the introduction of the evidence for the plaintiff, and before opening the defense, the defendant, by its said attorney, made a motion for a judgment of nonsuit on the ground that the plaintiff had failed to prove a sufficient cause for the jury, which motio the court denied, and to said ruling of the court in denying s motion the defendant at the time excepted, and its exception allowed by the court.

JUNE 28TH, 1887—9.30 a. m.

Motion of Mr. McNaught for a nonsuit denied by the court and an exception taken and the same allowed by the court.

Defendant's Opening.

Mr. McNAUGHT: If your honor please and gentlemen of the jury I will state to you as concisely and briefly as I can the defendant's defense, and show you to what causes we attribute the accident.

The complaint on which the plaintiff bases his causes of action, paragraphs four and five, reads as follows: "That the defendant, not regarding its duty, conducted itself so carelessly, negligently, and unskillfully in that behalf that it provided an unsafe, defective, and insecure trimmer; an unsafe and insecure machinery and apparatus for the operation of the same, of which the defendant at all times had full notice." Paragraph fifth: "That the plaintiff had no knowledge or notice or means of knowledge of the unsafe, defective, or insecure condition of the said trimmer or said machinery or said apparatus until he received the injury hereinafter mentioned in the sixth paragraph of this complaint."

Four things are essential in the case to make the plaintiff's case: 1st, that we furnished a machine so defective that it was negligent to use it; 2d, that we knew it was so defective; 3d, that the plaintiff had no knowledge that this machine was defective or unusual in structure or insecure, and, 4th, that he had no means of knowledge of its unusual, insecure, or defective condition.

That the plaintiff must prove these four facts by a fair preponderance of the testimony we will explain, we think, very satisfactorily to you. If there is any doubt upon the question now that the plaintiff did have knowledge that this machinery was unusual, and that on the morning he received his injury it was insecure and unsafe and dangerous, the plaintiff must prove these facts by a fair preponderance of the evidence. The plaintiff has offered upon this proposition one witness, Mr. Spencer, who testifies that
83 he informed the plaintiff on the morning of the injury before that time that the machine in question was in a bad condition and was dangerous. The plaintiff says, in his testimony, that he does not think any one informed him of that. The first question will be whether there was any proof sufficient to put us upon our defense upon that point. We will assume that there is some, and we will show you by proof, to the satisfaction of any jury in Christendom, that the plaintiff on that morning did have knowledge of the fact that that machine was defective because it was not babbitted, because on some former occasion, perhaps the day before, he had permitted the same to become dry, had not oiled it sufficiently, and caused the babbitt to heat and run out, and when he ommenced his work on that morning that he knew that the ma- inery in question was insecure and unsafe and dangerous. We show you that that is so by the testimony of C. M. Spaulding, will testify that soon after the injury the plaintiff admitted— him here in Seattle—in his presence here in Seattle, that he

did know, on the morning before the injury occurred, that this machine was unsafe and insecure and dangerous, because it had not not been properly oiled before, and the babbitt had been permitted to become melted, so it ran out, leaving the machine in an insecure and defective condition. We will also introduce upon the stand a witness who was with the plaintiff on the very morning that this machine was said to be defective, and on the very morning that the plaintiff received the injury complained of, before he commenced his work; that they together went up onto the scaffolding, or in the second story of the mill, where the pulley and the bearing is located, and inspected it and examined it carefully before starting the mill on that morning, and at that very moment of time the witness said to Mr. Hawthorne, "That machine is dangerous and defective, and I advise you, sir, not to run it to-day until it is repaired." Mr. Hawthorne, in reply to that, said, "Well, somebody has to run the machine, and I would just as well take the chances as anybody;" and that he started the machine and run it for an hour and a half or two hours with the perfect and full knowledge of its condition, and that we expect you to find as a fact in this case that he had such knowledge, and expect you, when you find that he had such knowledge, then to find for the defendant. We will show you by the testimony of Mr. Plummer, a young man who was about the machine in this mill with the plaintiff, that the plaintiff had frequently, prior to the time of the accident, examined this particular machine, knew each and every part of the structure, knew each and every part of the pecuriar mechanism, knew each and every defect in it, if any there was, and with that knowledge operated and ran the machine until the time of the accident. We will show you that this machine has been in use since 1879, been in use for 7 years—nearly 7 years—in the condition that it was in at the time the plaintiff received the injury, so far as the structure was concerned, so far as this
84 peculiar nut and this peculiar gas pipe and these peculiar pulleys were concerned; that it was used by various employees, operated by various superintendents and for-men, all regarding it as being safe when properly cared for and properly managed, properly babbitted and properly oiled.

We shall expect you as men of good sense to find as a fact that that which you in your every-day life use and find all right is not negligent for some other person to use under the same circumstances. We will show you that at the time of the injury that this plaintiff had greater knowledge of the particular defects and dangerous condition of this machine than did the defendant in this case or any of the officers or foremen of the company. We will show you that this averment in the complaint that they have no knowledge of the defective character of this machine or means of knowledge to be absolutely untrue. In addition to that we will show you that this is one of the usual cases where a man receive unfortunately an injury in a mill or in an employment partly his own negligence or entirely by his own negligence, and that plaintiff, for the purpose of increasing the damage he may re at your hands, if he recover at all, is pretending that his i

are greater than they are; pretending that the numbness and stiffness of the limbs, the want of circulation and dizziness of the head, and dimness of vision is caused by a blow upon the head. We will show you by testimony, that cannot and will not be seriously controverted in this court, that this is caused by organic disease of the heart, and we will show you that that is the reason why the wife of the plaintiff did not want the husband to be examined by the physicians on yesterday. Not only that, but we will show you that the condition of this plaintiff is such that if during the last year he had been a man capable otherwise of performing physical labor, the disease of the heart is such that he would probably have been in his grave to-day. We will show you that that was the cause of the faintness on Saturday and the wet cloths upon the head yesterday. In keeping with the scheme of, when a man receives an unfortunate injury, he augments to recover more, if he can recover at all, than he ought to under the circumstances. When we have shown you these facts we think then that we will be able to prove that the defendant in this didn't have knowledge—this defendant didn't have knowledge—that this particular structure was defective. We will show you that this machine was constructed by Mr. Colman, Mr. James M. Cilman, in 1879. After he had constructed it and ran it awhile he transferred it to a corporation I have forgotten the name of, some Seattle Mill Co. or something of that kind, owned by Mr. Colman, Mr. Baldwin, and others here in Seattle, running this same machine all the time; that after they had operated it a few years they sold it to the present owners, the present defendant. We bought it supposing it to be a good mill in running condition, and knew no more about its character and condition and situation than the plaintiff in this case, and that we did not, on the morning of the injury, on the morning of the accident, the day
of the accident, have as much knowledge as to its partic-
85 ular situation and particular danger as did this plaintiff.

So, then, we expect you to find upon that testimony that the plaintiff had knowledge, and more knowledge, of the particular danger, the dangerous condition, than we did; show that he had the same means of knowledge that we had, and that this machinery has been used for a number of years without accident or injury to any one, and was no- so defective as to be dangerous if properly cared for. We expect to show you that it was the duty of this plaintiff, who operated this machine, not only to oil, but that it was his duty to inspect it, and it was his duty when he found it out of repair to report it, and that if he failed to discharge that duty that he *he* was guilty of negligence, contributing to the injury; and I am glad to know that there are some gentlemen upon this jury who are mill men, and have some experience in that sort of thing. And with that I submit the opening of the case.

Mr. McNaught: I will first read the testimony of Mr. Spaulding d of Mr. Plummer.

r. Haines: If the court please I desire to interpose some ob- ns to some of that testimony. I have looked for the affidavit

1.

they had yesterday, and the clerk could not find it. I have not had an opportunity to examine the exact allegations. (Mr. Haines examines a paper.) That is all right.

Mr. McNaught: The deposition of Mr. C. M. Spaulding testifies as follows:

Mr. Haines: I suppose you read from the affidavit for a continuance?

Mr. McNaught: Yes, sir.

That the jury may distinctly understand what I am reading from, we move for a continuance of the case, in order to obtain the testimony of Mr. C. M. Spaulding and Mr. E. Plummer, and, for the purpose of avoiding a continuance, the plaintiff admitted that Mr. Spaulding and Mr. Plummer would testify as here stated, and for the purposes of this case this is to be regarded by you, to all intests and purposes, as if they were here upon the stand and testified what I read. The court will instruct you that that is the law, and that is the condition of the case. (Mr. McNaught reads from said affidavit:)

"That the said plaintiff, soon after receiving the injury complained of in his complaint in the above-entitled action, said that on the morning of the day he, the said plaintiff, was injured that he found upon the examination of the machinery that the same was not in good running condition, and that for the reason that the same had not been oiled it had become heated and melted the babbitt in the pulley, and caused the same to drive the nut off the bolt holding said pulley and caused the pulley to fall; and that the said plaintiff, before going to work in the mill on the morning of the day the said plaintiff received the injury complained of in the complaint in the abo*b*e-entitled cause, was informed by one of his fellow-workmen in said mill of the dangerous condition in which said machinery was at said time, and advised him not to under-
86 take to run said machine on said day, and without anything other or further appearing the said plaintiff, with said knowledge, undertook to run said machine, to wit, said trimmer, in the condition aforesaid."

Mr. McNaught: Testimony of Mr. E. E. Plummer (reads):

"That the plaintiff, prior to the time of the injury complained of in the complaint in the above-entitled cause and frequently, examined said trimmer and the machinery connected therewith, especially that portion of it claimed to be defective, and knew its condition and the character of the structure, and was fully informed of all the defects, if any, in the construction thereof, and of any and all defects in the material used in said machiner- and of any and all defects therein, and that with such knowledge plaintiff, without further appearing, continued to use such machinery up to the tim he received the injuries complained of in the above-entitled caus

H. G. SMITH called as a witness for the defense and sworn.

(By Mr. McNAUGHT:)

Q. Mr. Smith, what is your business?

A. Saw-milling.

Q. How long have you been engaged in the saw-mill business?

A. About 18 years.

Q. Where are you working, if at all, at the present time?

A. I am working in the saw-mill.

Q. What company?

A. The Oregon Improvement Company, I guess.

Q. How long have your been working—that is, the mill of the Oregon Improvement Co. or the Columbia and Puget Sound R. R. Co., I suppose?

A. I commenced to work there in the fall of '83; very near four years.

Q. Have you been working there ever since?

A. Working there ever since, with the exception of one month.

Q. Were you in the mill on the morning that Mr. Hawthorne received the injury complained of here?

A. Yes, sir; I was.

Q. Do you know what the condition of the trimmer was upon that morning?

A. Well, I went up and examined the trimmer that morning.

Q. Anybody with you?

A. Mr. Hawthorne was with me.

Q. What time in the morning did you make that examination?

A. It was before we started up in the morning. I could not tell whether we started that morning at 7 or 8 o'clock.

Q. Well, what occurred; what condition did you find the trimmer in?

A. I saw the pulleys were very loose on the shaft. I thought that the babbitt had run out, and it was not fit to run without being repaired and overhauled.

Q. What, if anything, did you say to Mr. Hawthorne?

A. I told him I thought he ought not to run that machine that day; that I wouldn't run it myself; if I was in his place I would not run it. It was not safe to run.

Q. He was there with you at that time?

A. He was up there with me.

Q. And made the examination the same time you did?

A. I went up at his request.

Q. Went up at his request to examine it?

A. Yes, sir.

87 Cross-examination by Mr. HAINES:

. What time in the morning was it you went up there, Mr. th?

It was before the mill started. I am not sure whether we at 7 or 8 o'clock that morning.

Q. You say that Mr. Hawthorne requested you to go up and examine it?

A. Yes, sir.

Q. What position did you have in the mill there at that time?

A. I was sawyer.

Q. What was it you found was the matter?

A. I got hold of the pulleys and shook them and saw what was the matter. I couldn't see anything else. I saw they was very loose on the shaft, and supposed that the babbitt had partly run out or altogether.

Q. And you told him that you thought it was dangerous?

A. I told him it was dangerous.

Q. Don't you think it was dangerous, anyhow?

A. I don't think it was dangerous when it was repaired, in good shape, with the common run of machinery.

Q. You don't? You consider it a safe machine, do you, Mr. Smith?

A. I don't consider any machine a safe machine. I consider it as safe a machine as the general run of machinery.

Q. You never saw one like it before, did you?

A. I did not.

Q. Don't you consider that the shaft being a gas pipe and light threads that it would be an unsafe machine, no matter how well it it was taken care of?

A. Well, the gas-pipe shaft itself—this is not a driving pulley; it is merely a rider to carry the belt. It is not likely to spring that shaft as a carrying pulley.

Q. I know. But wouldn't you consider it unsafe, no matter how well it was taken care of, from the fact that it was on a gas-pipe shaft?

A. Well, I couldn't say that I considered it unsafe when in good repair.

Q. When in good repair?

A. When in good repair and well taken care of.

Q. You think it was a perfectly safe machine when it was in good repair?

A. That is, as far as my judgment of machinery goes.

Q. Was not Mr. Hawthorne up there for the purpose of oiling that machine?

A. Well, if he was I could not say. I was down-stairs, away back at my end of the work, when he asked me to come up and look at it.

Q. When did you first notice the condition that you say the machine was in?

A. Well, when he called me up there; it was that morning. He had spoken to me once before, some time.

Mr. McNaught: That is not material; anything that occurred about that time. It is not cross-examination.

Mr. Haines: I think it is proper cross-examination, if your ho please.

The Court: In regard to what occurred that morning.

Mr. Haines: For the purpose of throwing light on the winess's credibility.

The Court: The witness may answer.

Mr. McNaught: We except.

The Court: Exception allowed.

88 Q. He spoke to you once before, you said?

A. Yes, sir; some time before.

Q. How long before?

A. Probably a week or so; I could not recollect.

Q. And didn't you tell Mr. Burgess about it?

Mr. McNaught: We object. That is not averred in the complaint. It is not a part of the case. It is not cross-examination.

The Court: I think it is.

Mr. McNaught: We except.

The Court: Exception allowed.

Q. Didn't you tell Mr. Burgess about it, Mr. Smith?

A. Well, I usually informed him. I could not say for a fact whether I told him just at that time or not.

Q. Didn't you tell Mr. Burgess that that pulley was loose on the shaft and the shaft needed babbitting?

A. Which pulley?

Q. One of the pulleys on that shaft.

A. I have told Mr. Burgess several times about the trimmer, but I cannot say whether I told him just at that exact time.

Q. You told him it was unsafe, didn't you, and needed babbitting?

A. I never told him the machine was unsafe.

Q. Didn't you tell him it was loose?

A. I told him that the machine wanted repairing.

Q. Between the time you told him that and the time you told Mr. Hawthorne had it been repaired?

A. Yes, sir.

Q. Between the last time you told Mr. Burgess and the time you told Mr. Hawthorne had it been repaired?

A. Yes, sir.

Q. Now, didn't you on the morning that Mr. Hawthorne was hurt have a conversation with Mr. Burgess in regard to that machine?

A. I don't recollect that I did.

Q. Will you swear that you did not?

Mr. McNaught: We object to the question as immaterial and not cross-examination.

The Court: Objection overruled.

Mr. McNaught: We take an exception.

The Court: Exception allowed.

e Court: Answer the question, Mr. Witness.

What was the question?

(By Mr. HAINES:)

Q. If you didn't have a conversation with Mr. Burgess that morning Mr. Hawthorne was hurt.

A. I don't remember speaking to Mr. Burgess about the machine after the first time Mr. Hawthorne notified me of it.

Q. Didn't you on that morning have a conversation with Mr. Burgess and Mr. Burgess tell you that he would send Campbell, and he was going to fix the machine?

A. No, sir; I think that was the time before.

Q. How long was that?

A. Well, from three days to a week before the accident occurred, as near as I can remember.

Q. And you say that you had no conversation with him that morning in regard to it?

A. No. The best of my recollection is we didn't have a conversation. I think after I came down-stairs I went back to my work. That is the best of my memory.

89 Q. But you wouldn't swear positively but that you did have a conversation that morning, in which you spoke of the defective condition of that machine?

A. I could not say either way; I cannot remember.

Q. What position did Mr. Burgess occupy there?

A. He was superintendent of the mill.

Q. You didn't notify Mr. Hawthorne regarding what the particular danger was, did you?

A. No, sir; I think he knew it.

Q. I didn't ask you that question, Mr. Smith. I asked you whether you told him that morning?

A. No, sir; I told him that he ought not to work there; that the machine was not safe. That was the words I used.

Q. You didn't tell him that the pulley was liable to run off?

A. I don't know that I thought of that. I didn't tell him.

Q. You didn't think that was really the danger, did you?

A. My impression of the danger was a pulley coming off.

Q. Mr. Smith, wasn't the danger that you apprehended that the shaft would heat?

A. Well, that was my impression—that the pulley would heat on account of the babbitt being out.

Q. And did you think that the nut would come off? Was that the danger you apprehended?

A. I don't think that thought entered my mind.

Q. No; that would have been one of the last things you would have thought of, wouldn't it?

A. The only danger I saw or thought of was the pulley coming off. Of course the nut would have to come off to let the pulley.

Q. Then you apprehended the nut would come off?

A. No. I don't think that thought entered my mind; but th of course I thought of the pulley coming down.

Q. That was what you thought?

A. Yes, sir.

Q. You never told Mr. Hawthorne anything except that it was dangerous and you thought he ought not to work there?

A. Yes, sir. I told him (cut short)——

Q. What answer did he make to you, Mr. Smith?

A. Well, he said that some one had to run it, and I may as well run it.

Q. Where was Mr. Burgess at the time you had this conversation?

A. I don't remember seeing him around.

Q. Was Mr. Campbell around at that time?

A. No, sir.

Q. Didn't you see Mr. Hawthorne up there that morning oiling that machine?

A. He was up there with me.

Q. And he was oiling it, wasn't he?

A. I don't remember of seeing him oiling.

Q. In order to oil it he had to go up there?

A. Yes, sir.

Q. Was that what he was up there for that morning?

A. Well, I think he was; but I didn't see him oil it.

Q. He was accustomed to oil that machine regularly, wasn't he?

A. It was his business to oil it.

Q. He was accustomed to? Didn't you see him up there often oiling the machine?

A. Yes, sir.

Q. Wasn't he up there often every day?

A. I think he went up there twice a day to oil it, as near as I can remember.

Q. You say you were sawyer there?

A. Yes, sir.

90 Q. Did you have anything to do with having charge of the machinery?

A. I hav-n't any charge of the machinery generally. If there is anything wrong sometimes the men report to me if Mr. Burgess don't happen to be around.

Q. Mr. Burgess is the man in charge there?

A. Mr. Burgess is in charge of the mill.

Q. Didn't you say to Mr. Hawthorne that morning that you had seen Mr. Burgess, and that he had promised to fix the machine or had instructed Campbell to fix the machine?

A. I don't recollect of telling him that morning.

Q. You may have told him that morning, may you not, Mr. Smith?

A. I don't think I did.

Q. Hav-n't you so stated?

A. I have made that remark to you once, but it was on short otice. I hadn't time to think the matter over.

Q. Since you have thought it over you have changed your mind?

Well, I have found out that I made some mistakes.

Didn't you state to me, in the conversation that you refer to, ou told Mr. Hawthorne that you had seen Mr. Burgess and reported the defective condition of the machine, and he had promised to fix it?

A. I made that remark (cut short)——

Q. Since that statement you made (cut short)——

A. I made that statement to you, but it was—(pauses); when I come to think the matter over, it was the time just before it was repaired.

Q. When did you change your mind on that subject?

A. Well, as soon as I found out that I was going to be called as a witness and I was subpœnaed by you I went and thought the matter over. I never paid any attention to it before.

Q. Then you changed you- mind? Do you remember when it was that you made that statement to me?

A. I think I made that statement to you at Mr. Hawthorne's house. I don't know now.

Q. Didn't you make that statement within a week?

A. I told you something similar to that at that time. I think I told you I was not positive about time.

Q. Didn't you within a week state to me that you made that statement to Mr. Hawthorne that morning?

A. I don't think that I told you within a week that I said to Mr. Burgess that morning or said to Mr. Hawthorne that I told Mr. Burgess about it. I think the last time I told you was up in Mr. Hawthorne's house.

Q. You are acquainted with Mr. William Morris, aren't you?

A. I am not.

Q. Don't you know him when you see him?

A. I know him by sight since being called on the stand here. I didn't know him before.

Q. Are you acquainted with Mr. Sheehan, who was called here as a witness?

A. I know Mr. Sheehan by sight.

Q. Henry Sheehan, the witness, who was a witness here?

A. I don't know his first name, only Sheehan. I saw him called up here. I am not acquainted with him.

91 Q. Did you not state to me in their presence on Thursday evening, in this city, at my office, that you made that statement to Mr. Hawthorne that morning?

A. That I said to you that I told Mr. Burgess about the machine?

Q. That you told Mr. Hawthorne that morning that you had seen Mr. Burgess about the machine and that he promised to fix it.

A. I think I told you that I had notified Mr. Burgess, but I didn't tell you that I told him that morning.

Q. Didn't you state in the presence of those men, at that time and place, that you made that statement to Mr. Hawthorne the morning he received the injury?

A. The morning he received the injury?

Q. Yes, sir.

A. I don't remember.

Q. You may have made that statement, however?

A. I don't think I did.

Q. Still it is possible that you may have made it?

A. I am almost positive that I didn't say that I told him that morning.

Q. And now, come to think it over, you think you didn't tell me at all, don't you?

A. I kind of think so. I think I told you that I notified Mr. Burgess, but I didn't state what time.

Q. But now, come to think it over, when you had had a chance to think it over, since you found you were going to be a witness in the case, you think that you didn't tell Mr. Hawthorne at all that you notified Mr. Burgess and that he promised to fix it?

Mr. McNaught: I think that is not fair. The witness has testified that he did tell Mr. Hawthorne before and it was repaired afterwards, but after he examined it the second time, on the morning of the injury, he didn't tell Mr. Burgess.

The Court: I am inclined to allow considerable latitude in this sort of a case, Mr. McNaught.

Mr. Haines: Mr. McNaught's recollection of the testimony does not agree with mine.

A. I think the time that I told Mr. Hawthorne that I informed Mr. Burgess was the first time that he called my attention to it. I think the morning the accident occurred, after seeing Mr. Hawthorne and notifying him, that I went back to my work, and that was the last of it.

Q. Well, now, let us have this thing definitely understood, so we won't waste any more time. I understood you to say here now, Mr. Smith, that you never said that you told Mr. Hawthorne the morning of the accident that you had seen Mr. Burgess—that is, that you didn't make that statement to me?

A. As near as I can recollect, I don't think I made that statement—that I saw Mr. Burgess that morning.

Q. Well, are you prepared to testify that you did not make that statement to me?

A. Up in your office?

Q. Yes, sir.

A. Yes, sir; the best of my recollection is that I didn't say that morning.

Q. Are you prepared to say that you did not make that statement at Mr. Hawthorne's house?

A. I did make that statement.
92 Q. In his presence and mine?
A. I did make that statement.

Q. You did make it then?

A. Yes, sir.

Q. How long ago was that?

A. Well, I don't remember the date. It was the time Mr. Logan here last fall, and the Grand Army. It was along last fall. It he same day.

ince then you have had a chance to think it over, and made up your mind, and think that you did not state the fact when you made that statement to Mr. Hawthorne and myself over there?

A. I only had half an hour's notice that evening, and I spoke as it came into my mind. I never thought the matter over; that I was going on the stand; that was that you only just merely wanted to know what I knew about this thing, and I talked just as it came into my mind. I never thought the matter over. I only had half an hour's notice. But since I have thought this matter over thoroughly I have found out that I was mistaken.

Q. Yes. Didn't you state in that conversation with me that you considered this to be a dangerous machine?

Mr. McNaught: We object, if your honor please, as not being proper cross-examination.

The Court: I don't remember just what his direct testimony was on that subject. It has slipped from my mind.

Mr. McNaught: Simply what was said to Mr. Hawthorne about the condition he found it in on the morning of the examination.

One of the jurors: The direct testimony was that he considered it a safe machine, if it was in proper repair.

The Court: I think he said that to Mr. Haines. The objection will be sustained.

(By Mr. Haines:)

Q. Are'nt you quite positive that Mr. Hawthorne oiled the machine that morning?

Mr. McNaught: That question has been asked now the fourth time.

The Court: The third or fourth time.

Mr. Haines: If it is answered that way, why I am satisfied.

The Court: You may answer, Mr. Witness.

By Mr. Haines:

Q. Aren't you quite positive that Mr. Hawthorne oiled it that morning?

A. I could not swear that he did. I did not see him oil it.

Q. Didn't you state in the presence of the parties I have mentioned, and others, in my office last Thursday evening, that you were positive or quite positive that Mr. Hawthorne oiled that machine that morning?

Mr. McNaught: We object as not proper cross-examination.

The Court: Objection overruled.

Mr. McNaught: We except.

The Court: Exception allowed.

A. I don't think that I said to you that I was positive he was oiling it.

Q. Quite positive. I didn't say positive.

A. I think I told you he went up. He was supposed to oil i

Q. And that is what you thought he was up there for?

A. That is what I thought he went up there for.

93 Q. And you think so yet?
A. I think so yet.

Redirect examination by Mr. McNaught:

Q. How did you come to be up at Mr. Hawthorne's at the time Mr. Haines speaks of?

A. Mr. Hawthorne came to my house while I was eating supper——

Mr. Haines: Which Mr. Hawthorne?

A. Mr. Hawthorne that got hurt; and he wanted to know if I would come up and tell Mr. Haines what I knew about the affair; that Mr. Haines would like to see me. I agreed to go up.

Q. How soon afterwards did you go, if you went?

A. Just as soon as I ate a supper and changed clothes. Probably half an hour.

Q. Who was there with you at that time?

A. Where?

Q. At Mr. Hawthorne's?

A. There was that gentleman there sitting alongside of Mr. Haines (pointing to Mr. H. H. Hawthorne, not the plaintiff), and one Spencer came afterwards to Mr. Hawthorne's.

Q. When first did you say anything about having notified Mr. Hawthorne that morning of the dangerous condition of the machinery?

A. I disremember.

Mr. McNaught: That is all.

Recross-examination by Mr. Haines:

Q. You had been there before, hadn't you, Mr. Smith?

A. I went there once. I was asked to come there once on the same errand, and you didn't come to the house.

Q. How long was that before this time?

A. As near as I can remember, it might be two weeks, a little more or less. I don't remember exactly.

Q. At whose request did you go the other time—the time before that?

A. Well, the first time I was requested to come I happened to be going there to Mr. Hawthorne's residence, and he asked me then if he was to call on me if I would come over and tell you what I knew about it, and I told him I would do all I could for him; but I don't remember now whether Mr. Hawthorne came to my house or whether it was my woman. It was through her, I think, that I was notified to come up there.

Q. How far do you live from Mr. Hawthorne's?

A. I live about two blocks.

Q. You are not positive that he came to your house, are you, Mr. Smith—Mr. Hawthorne?

A. The first time (pauses). The second time I am positive. I
’t remember. I think it was my wife the first time.

. Haines: That is all.

McNaught: That is all.

Dr. E. L. Smith recalled for the defendant.

(By Mr. McNaught:)

Q. Dr. Smith, what is your profession?

A. Physician and surgeon.

Q. How long have you been practicing as such?

A. Seventeen years.

94 Q. What college, if any, are you a graduate; what medical school?

A. Of the regular school of medicine.

Q. How long have you been practicing in the city of Seattle?

A. About nine years.

Q. What, if any, attention, Doctor, have you ever given to the examination of persons having heart disease; what experience have you had in such cases?

A. Well, I have had considerable experience. As a general practitioner, I have had my share of those cases.

Q. Have you ever, at any time, examined the plaintiff in this case, Mr. Hawthorne?

A. Yes, sir.

Q. When?

A. Yesterday.

Q. At whose request did you make the examination? Well, it came from us?

A. Yes, sir.

Q. Where did you examine him?

A. At his dwelling.

Q. In Seattle?

A. Yes, sir.

Q. What, if any, ailment or trouble did you find not connected with the injury on the head of the claimant?

A. Doctor Smart was with me and Doctor Minor. I found he was suffering from organic disease of the heart.

Q. Organic disease of the heart; to what extent, Doctor; how serious?

A. I think he is a very sick man.

Q. A very sick man?

A. He is in the breaking-down stage of organic disease of the heart. What I mean by that is the stage of palpitation.

Q. Where a man situated as the plaintiff is with the organic disease of the heart—situated as he is with that disease, what amount of physical labor would he be able to perform?

A. None at all, I think.

Q. What is the probable duration of the life of a person with organic disease of the heart in the condition of that of the plaintiff in this case?

A. That is a very difficult question to answer, for sometimes the live a long time with organic disease of the heart—a whole li time—but it is usually not very long after dilatation of the h begins to take place, which is the enlargement of the cavities long as that does not predominate he could get along very

Q. How did you find him at the time you went there as to the position he was sitting in?

A. He was lying on the lounge when we went into the room. He sat up, though, while we were there.

Q. How did he have his feet when he was sitting up?

A. I don't remember how he had them. I think they was on the floor.

Q. You don't remember?

A. I may be mistaken about it.

Q. Did you examine his head at that time?

A. Very little.

Q. Why did you not make an examination of the head?

A. We had no opportunity to make a careful examination of the head.

Q. Why?

A. Mrs. Hawthorne didn't like to have us handle it, because he said it hurt him. We saw the scalp. That was about all.

Q. From what you did see did you discover any fracture of the external table?

A. No, sir.

95 Q. You discovered no fracture of the skull?

A. No, sir.

Q. If he had received an injury on the skull or head, say on the left side, so as to cause numbness of any portion of his body or partial paralysis, which side would that appear upon?

A. On the opposite side.

Q. On the opposite side?

A. Yes; opposite from the injury.

Q. Then if the injury was on the left side of the head it would not be the left arm and the left leg, but the right arm and the right leg, that would probably be affected?

A. Yes, sir; that is the rule. I think there is an occasional exception to that.

Q. That is the rule? What work—manual labor—could the plaintiff have performed during the last year with the heart disease?

A. I don't believe he has been able to perform any labor for the last year.

Q. In consequence of the heart disease—that is, you attribute it to that?

A. Yes, sir.

Q. Is there any connection between the injury on the head and the organic heart disease?

A. I don't think so.

Cross-examination by Mr. Haines:

Q. What evidence, Doctor, of organic disease of the heart did find?

A systolic murmur; quite a loud one.

A very loud one?

uite a loud one.

Q. What do you understand by organic disease of the heart?

A. By organic disease of the heart I mean a change in the structure of the heart itself; an alteration in the size or shape of the valves in this case.

Q. What is it caused by?

A. Most frequently (interrupted)——

Q. Generally.

A. Quite often from rheumatism.

Q. What other causes?

A. Sometimes from specific diseases, such as syphilis—a variety of causes.

Q. Have you known cases or read of cases where such a disease as this one you detected in Mr. Hawthorne has been occasioned by a fall?

A. Such cases have been known where, from a fall and concussion, the valves would be ruptured.

Q. Cause a lesion there?

A. Yes, sir.

Q. Suppose, Doctor, that Mr. Hawthorne was a man, a strong, vigorous man, never troubled with shortness of breath or any apparent difficulty about his physical system at all; a man who could do a good day's work, work right along with other men, never sick a day up to the time he received this injury, and from the time he received that injury was in the condition or approaching to that condition in which you found him, would you think he had organic disease of the heart at the time of the injury?

A. When? Now, at the present time? I know he has at the present time.

Q. Would you not think, then, that that was caused by the concussion? Suppose this was occasioned by the falling of a wheel weighing between forty and fifty pounds a distance of eight or nine feet, in consequence of which he was felled instantly to the floor, wouldn't you come to the conclusion that the condition of the heart that you now find was caused by this fall?

A. I don't think I would.

96 Q. You don't think it would? That accident has no connection with it?

A. It can almost be excluded as a cause. I say cases have been known where that has been the case.

Q. How could you account for the fact of the man's being perfectly well up to the time of the accident occurring and a very sick man ever since?

A. Persons may have organic disease of the heart for years and not know it and enjoy very fair health.

Q. What would be your explanation of its appearing so suddenly?

A. Well, I don't know that it has. He has been confined to the house for about two years.

Q. A year ago last October?

A. Yes; a year and a half.

Q. You consider him pretty bad now?

A. Yes, sir.

Q. A person may have organic disease of the heart and go along through life and get to be pretty old before they discover it, can't they?

A. Yes, sir; and perhaps never discover it, and die of it some time eventually.

Q. And some sudden blow or fall or period of intense excitement will bring it on or make it manifest, won't it, Dr.?

A. Yes, sir.

Q. So that it is quite possible that Mr. Hawthorne might have attained to a good old age and still had organic disease of the heart if it hadn't been for the blow he received in the mill on that occasion. Isn't that so?

A. I am not prepared to say whether that acted as a fact in the disease or not. I don't know what might have caused it.

Q. You say such instances are known?

A. I say—I do say that it is possible.

Q. You say that it is possible, but not probable, that the injury might take place?

A. An injury to one of the valves might occur from a violent fall and be thus injured.

Q. Instances have been known where a violent fall would cause a lesion which would result in what you would call organic disease of the heart?

A. Yes, sir.

Q. That is possible. Now, it is also possible, is it not, that he may have had organic disease of the heart all the time and it had been aggravated or made manifest by this very fall?

A. I think that is possible.

Q. Don't you think that was probably the case that he was troubled or rather had organic disease of the heart prior to the accident, supposing him to be a perfectly healthy, active man up to that time?

A. Well, I don't know. From the evidence which I have heard I should think not, because after the injury there was a time he improved and was a good deal better than he is now. There is no history of his having got suddenly bad with the heart disease immediately after the injury.

Q. But have you heard any evidence to show that he was anywhere near approaching to a well man after that accident?

A. I don't know that I understand the question.

Q. Suppose, Doctor, that after the accident he remained in bed a month or six weeks and has never since been able to do any work other than scratch around the garden for ten or fifteen minutes at a time, and has on a few occasions sawed a few sticks 97 of wood and has never been able to do any work except that—never been able to walk any great distance—never been able to bear any particular excitement or noise—would you consider that e had improved after that fall enough to count it at all in con- ering the case?

I listened to Dr. Miller's testimony yesterday (cut short)——

I am asking you this question?

A. I know nothing of the case since the injury. I know nothing of the history of the injury.

Q. I am putting a hypothetical case to you; I wish you would answer.

The COURT: On the hypothesis he puts in the question he asks your opinion as an expert, Doctor.

A. I don't know that I understand the question; I am afraid I do not.

Q. I will ask you this question in a different form. Suppose, Doctor, he was a strong, healthy man, doing a regular day's work; had no difficulty and being conscious of no trouble of any kind, no disease whatever, up to the time that he received this blow from the wheel; suppose he was in bed for a month or six weeks, and from that time he has never been able to do any work other than hoeing in the garden for 10 or 15 minutes and sawing two or three sticks of wood, never been able to walk more than four or five blocks without resting, has never been able to endure any excitement, would you consider that that condition was—that is, since the accident—inconsistent with his having this heart disease brought on or occasioned by the fall? Wouldn't you say, under those circumstances, that the heart disease was rather caused by the blow or was developed by it?

A. No, sir; I don't think so.

Q. You don't think so; yet it is possible that the heart disease may have been aggravated by the fall?

A. I don't think the blow upon the head would affect it at all.

Q. I know; but the fall that resulted from the blow, how does that operate in causing or aggravating heart disease—a sudden fall?

A. The concussion and jar might rupture a valve.

Q. That might do that in a perfectly well man?

A. Yes, sir.

Q. It would be much more apt to do it in the case of a man whose heart was affected?

A. I don't think that it would.

Q. You think not?

A. No.

Q. Wouldn't you regard the fact that he had always been a perfectly well man up to the date of the accident and had been an invalid, perfectly unable to help himself so far as any labor was concerned or getting around since the accident, tended very strongly to the theory that the heart disease was either occasioned by the fall or the blow or was developed by it? Wouldn't you consider that was pretty strong proof of it as a physician?

A. If he had had the symptoms he has now ever since the injury I should think there was; but I don't know that is the case.

98 Q. Of course you don't know that is the case. I say, taking those facts without knowing whether he had those sympto
or not?

A. I wouldn't think so. If the murmur could have been h
after the accident, and after the injury if he had early sym

of organic disease of the heart, I should think that might be the case.

Q. Wouldn't you consider it rather a singular fact that this man was perfectly well up to that time and has been sick ever since if the accident had nothing to do with it? Wouldn't — strike you as a little singular?

A. I don't think it would.

Q. There is nothing strange in medicine. The man might have been and was seriously injured?

A. The man was injured seriously.

Q. You think the injury was a serious one?

A. Very likely, and it necessarily laid him up for some time, and during the time he was laid up the heart disease probably was developing and becoming worse ever since—very likely. Possibly the heart trouble antedated the trouble in his head.

Q. Possible; possibly not?

A. Possibly.

Q. How would you account for the heart disease developing so rapidly after the injury and so slowly before it?

A. There is nothing in the evidence that makes me think it has developed rapidly.

Q. Mr. Hawthorne, supposing him to be a man 45 years of age at the time of receiving the injury, who never had any trouble with his heart or any organ of his body up to that time——

A. Organic disease of the heart might develop and prove fatal in a very few weeks.

Q. Without any existing cause?

A. Without any known cause.

Q. Is that the usual course of heart disease?

A. No.

Q. Usually there must be some existing cause in order to cause it to develop rapidly; isn't that the fact, Doctor?

A. That is true in some cases, but very frequently we know what the cause is.

Q. If a man had received a blow and a fall like that, on finding it had developed rapidly you would naturally look to that for the cause, wouldn't you? That would be the natural conclusion you would come to?

A. That the blow was the cause?

—. Of its developing so rapidly.

A. It is not particularly rapid.

Q. But it has developed within a year from last October?

A. That is not rapid.

Q. That is not rapid? What class of people are most subject to heart disease—that is, what occupation?

A. Well, I don't know, sir. People who are more subject to rheu[illegible]atism, I suppose; those that are exposed most, perhaps, to the [illegible]emency of the weather.

[illegible] Sailors, are they subject to heart disease?

[illegible] They have it.

[illegible]ut are they particularly subject to it?

A. I don't know that they are.

Q. They are exposed a good deal, aren't they?

A. There is no one that I exempt.

99 Q. Don't statistics show that certain persons in certain occupations have heart disease to a greater extent than persons in certain other occupations?

A. I don't know that that is the case.

Q. You say the cause is principally theumatism?

A. I say very frequently from rheumatism.

Q. What is the principal cause—rheumatism, especially?

A. Frequently.

Q. Take a man who has been accustomed to work indoors, a carpenter, and would you consider him particularly subject to heart disease?

A. He is frequently subject to heart disease.

Q. Particularly so?

A. Not particularly.

Q. Does it make any difference whether a person is a strong man or not in regard to their being subject to heart disease?

A. I don't think it does, much.

Q. What is murmur caused by, that you have spoken of?

A. It is caused by an insufficiency of one of the valves; in this case the mitral valve.

Q. An insufficiency?

A. Yes, sir.

Q. What do you mean by an insufficiency—that it is not large enough?

A. It means that it leaks during the systole; the blood regurgitates in the wrong direction through the valve.

Q. The heart is a sort of force-pump, isn't it?

A. Something of that kind.

Q. Does this murmur take place when the blood is ejected from the heart?

A. It is because it regurgitates through the mitral valve in the wrong direction.

Q. Will you explain that to the jury in a little plainer manner?

A. The blood leaves the left auricle and passes through the mitral valve into the left ventricle and leaves the ventricle—or it should send it through the aortic valve. In this case part of the blood comes back through the mitral valve into the left auricle.

Q. What is the cause of that?

A. The cause of that is because the valve does not close perfectly.

Q. Does not close perfectly? What is the cause of its not closing perfectly?

A. It is because it has changed shape.

Q. And what causes are there for the change of shape of this valve?

A. Usually that change is due to a deposit of fibrin and the va
become thickened and change shape. 1

Q. What do you understand by the term lesion as used in
tion to the valves of the heart?

A. Well, that is simply a term used to express anything that is of a morbid character.

Q. When you say lesion will take place in connection with a fall, explain how that would be.

A. It is the same as a lesion of the heart might take place; the same as a man might break his leg when he fell. The lesion might be at the heart instead of the leg.

Q. It is a sudden strain, isn't it, that causes it?

A. Yes; it would be the same as a continued rupture.

Q. And when it is occasioned by a fall that is the way it
100 takes place; it is a sort of a rupture in consequence of a sudden strain in some particular part?

A. I never saw one of those cases; I don't think there are such.

Q. Can you determine, Doctor, with perfect accuracy whether organic disease of the heart exists or not from the presence of a sound or murmur that you ascertain by the ear?

A. Not in every case. There is a murmur called an anæmic murmur, which is sometimes difficult to distinguish from the organic murmur. In some cases they are very plain and distinct.

Q. Isn't heart disease sometimes occasioned by poverty of the blood? Where a person's blood becomes poor and thin and does not supply the proper nutriment to the body, would that cause heart disease?

A. I doubt if that would occasion valvular disease of the heart.

Q. You think you have no doubt, however, but that this murmur you discovered indicates heart disease?

A. His murmur indicates organic disease of the heart.

Q. What is there about that to distinguish it from the other murmurs?

A. The anæmic murmur is a functional murmur. It is always heard plainest at the base of the heart, and the sound of the tremor is heard in the vessels of the neck, and the sound is heard over a large area. In this the murmur is plainest at the apex of the heart, which is never the case in the inorganic murmur.

Q. In what position was Mr. Hawthorne when you made the examination?

A. Sitting in a chair.

Q. Did you have him lie down?

A. No, sir.

Q. You don't know whether you could discover it when he was lying down?

A. Yes, sir; I could discover that one.

Q. You didn't take the trouble to find out?

A. I know without. I know it was.

Q. You know it was?

A. Yes.

Q. Suppose that as a matter of fact that murmur could be per-
ved when he was sitting up and not when he was lying down,
t would be your conclusion as to whether that was or was not
ic disease of the heart?

I can hardly conceive that to be the case.

Q. Now suppose, Doctor, on examination that you found out that that was the fact, what would you say, then, about your theory of organic disease of the heart?

A. The murmur is never heard so plainly when a person is in a reclining position. The heart recedes from the chest walls, but this murmur could be distinctly heard if the man lies on his back.

Q. In this kind of organic disease of the heart, even when he laid down, the murmur would not entirely disappear, I understand you to say?

A. The murmur will never disappear; it would not disappear; you could hear it after he laid down. I am sure I would be able to hear it. *I am sure I would be able to hear it.*

Q. Suppose you went up there and had Mr. Hawthorne lie down and that the murmur entirely disappeared, what would be your conclusion as to organic disease of the heart existing there?

A. The fact is it is not a supposable case.

Q. It is a supposed case. I want you to answer the question.

101 A. If it was an inorganic murmur it would not be certain to disappear on lying down.

Q. I would be obliged to you if you would answer my question. I am supposing a case.

A. I cannot answer a question that is absurd, because it is absurd.

Q. It is perfectly impossible?

A. Yes.

Q. And if you found it out to be a fact you would regard it as a miracle of modern days, wouldn't you?

A. It is not a fact.

Q. Suppose it to be a fact, you would regard it as a sort of a miracle?

A. I could not suppose it to be a fact.

Q. No; it is impossible?

A. It is impossible.

Q. You don't know whether it is possible or not?

A. I know it's not.

Q. Did you examine him when he was lying down?

A. No.

Q. And you testify that you know positively that the murmur is there without making any examination?

A. I know positively he has a murmur in that position of the body.

Q. Without examination? If you should go up there and didn't find any you would be at a loss to understand it at all? You would be at an utter loss to understand the situation if you should be actually convinced that there was no murmur when he was lying down?

A. Well, the question is an absurd one.

Q. The question is an absurd one, very likely. I want to know i you wouldn't find yourself at an utter loss to account for it?

A. It is not possible for such a thing to occur.

Q. It is not possible? Did you examine the carotids?

A. No, sir.

Q. You did not? Isn't that usual?

A. It is not necessary.

Q. Would an examination of the carotids throw any light on the question as to whether he had organic disease of the heart or not?

A. Not in this case.

Q. Would any impulse be transmitted to the carotids from the heart?

A. Very little. The trouble is the mitral valve. We do not see the pulsation on the carotids as strongly as we do where it is with the aortic valves.

Q. Still it would be noticeable?

A. Yes, sir; in late stages.

Q. Don't you regard him as being in the late stages?

A. Yes, sir.

Q. Then it would be niticeable to examine the carotids?

A. Very likely.

Q. Wouldn't you consider it the duty of an examining physician to make an examination of the carotids?

A. It is the duty of an examining physician to examine until he is perfectly certain of the diagnosis.

Q. You took no stethescope with you?

A. No, sir.

Q. Do you wish to be understood to say that this murmur is not an accompaniment of prolonged illness where the blood is poor and wanting in stimulating effects upon the valves of the heart?

A. It is common in those cases or diseases where there is an excess of fibrin in the blood. You may call it ditiated blood.
102 That is the case in rheumatism, and the case in many other
diseases, and supposed to be one of the most frequent causes of organic diseases of the heart.

Q. Have you ever noticed that in a patient who has been very much weakened by typhoid fever?

A. In that case you are very likely to get an inorganic murmur.

Q. Is there any difference in the sound between an organic and an inorganic murmur?

A. Very little.

Q. Very little? Is it not quite possible to mistake one for the other?

A. Sometimes it is. Sometimes it is very difficult to distinguish.

Q. How are they as regards the loudness—any difference there?

A. Sometimes the murmur is very faint. Sometimes it is very loud. In either case it may be very loud.

Q. What distinguishing feature was there in this murmur that made you conclude that it was an organic instead of an inorganic murmur?

A. I answered that question once. Because the murmur was heard loudest at the apex of the heart.

Q. Isn't that so in cases of anæmia?

A. It is not.

Q. You regard Mr. Hawthorne as a very sick man?

A. Yes, sir.

Q. Don't you regard the injury that you noticed, the scar on his head, as a severe wound—quite an extensive scalp wound?

A. Of course it is impossible for me to say whether he ever fractured the skull or not; but there don't seem to be any depression of the outer table.

Q. Suppose the outer table to have been fractured, would you regard it as a serious wound then?

A. Quite a serious wound.

Q. Suppose that the injury had been occasioned by a wheel weighing forty or fifty pounds falling a distance of from eight to nine feet and striking him on the head, would you consider then that the probabilities were that the outer table was fractured?

A. I would want to get evidence besides knowing how far the wheel had fallen.

Q. You don't think that would probably *n*reak a man's skull?

A. It might do it, certainly.

Q. The chances are that it would not?

A. I didn't say so. If I was called to dress the wound I would probably know.

Q. To make such a scar as you saw, what would be your judgment as to whether it did or did not fracture the man's skull?

A. I could not tell anything about it.

Q. Your judgment would be it did not fracture the skull?

A. It would depend on the manner in which the wheel impinged on the head. If it was a sidling blow it might have done very little injury.

Q. Isn't it generally the case where the outer table is fractured that there is depression of the inner table?

A. No, sir.

Q. That is not the case? Is it the rule that there is not depression of the inner table where there is fracture of the outer table?

A. Please ask that question again.

Q. I say is it the rule where the outer table is fractured that the inner table is not depressed? Any rule on that subject?

A. No, sir.

103 Q. You say that if he received the injury on the left side that the numbness would appear on the opposite side—the right side?

A. I say that is usually the case.

Q. It quite frequently happens that such is not the case?

A. It sometimes happens that it is not the case.

Q. Would you consider that this injury, from what you saw of it, was received on the left side?

A. The cicatrix is on the left side.

Q. Isn't it very near the middle?

A. It is near the line of the sagit-al suture, half an inch from and parallel with it.

Q. Suppose the blow was right in the middle, where would the numbness be felt?

A. It might be felt on either side. It might be felt on both sides, possibly. I don't know.

Q. Or on either?

A. Of course, there must be some lesion below the plate to cause the numbness or paralysis.

Q. There must be what?

A. Some lesion below the inner plate to cause either numbness or paralysis, and that is not always at the point where the injury seems to be from external examination.

Q. So it is quite possible that the injury could be received a little on the left, on the outside apparently, and the injury really be on the right side, under the plate?

A. The hemorrhage might be there, if there was any.

Q. And then where would the numbness be--on the right or left side?

A. On the opposite side from the lesion.

Q. So, really, from the fact that that cut is a little on the left side and the numbness on the left side, there is nothing very singular about that, is there, Doctor?

A. There is nothing impossible about that. I think it is unusual. It is quite unusual, but it might occur. I believe it might occur.

Q. Where the cut was so near the center it would be much more liable to occur than if it was further off to one side?

A. Possibly.

Q. Didn't Mr. Hawthorne complain of a sensation as though some ball or some object was rolling around in his brain or head while you were there?

A. I don't remember that he did.

Q. Doesn't that symptom signify anything as regards the lesion of the brain?

A. I would hardly know how to interprit it.

Q. Isn't that a well-known symptom of an abscess?

A. I don't think so.

Q. Did you ever hear of it before?

A. I may have.

Q. Now, Doctor, wasn't that fact mentioned between the physicians who examined Mr. Hawthorne on that occasion?

A. I say I have no recollection of it.

Q. Did any one go there besides yourself and Dr. Smart?

A. Dr. Minor.

Q. And you all went there at the solicitation of the defendant in this case, The Columbia and Puget Sound R. R. Co.?

A. I don't know.

Q. You went there at the solicitation of the defendant?

A. Yes, sir.

Q. You understood you were there at their instance?

A. Yes, sir.

Q. It was your understanding, and you are not prepared
104 to say but that this symptom was talked over among they
physicians in regard to this sensation as though there was
some object rolling around?

A. I have no recollection whether or not Mr. Hawthorne mentioned such a symptom. I have no recollection of us talking about it afterwards among ourselves.

Q. You don't know what this is a symptom of? You don't know of such a symptom? You never heard of it before?

A. I may have heard of it before. A doctor hears a great many symptoms that are vague and he cannot account for himself. I certainly would not know how to account for such a symptom as that.

Q. You say it is unusual when the outer table of the skull is fractured that the inner one is also injured?

A. I didn't say it was not.

Q. Isn't that usually the case?

A. It may be or may not be. Of course I don't know. I can't tell you whether the majority of cases—whether in the majority of cases the inner table is fractured when the outer one is or not.

Q. In this place, Doctor, wouldn't that be the rule when the outer table was fractured the inner table would be injured?

A. I don't think so.

Q. Are you acquainted with a work known as the Medical and Surgical History of the War of the Rebellion?

A. Yes, sir.

Q. Do you consider that reasonably good authority?

A. It is supposed to be.

Q. Suppose that in that work this statement is made by the author: "I am disinclined to admit that the outer table of the skull is fractured in the adult without injury to the inner table either by projectiles of war or any other external violence, except in rare instances, enumerated at the beginning of this subsection, of blows or impact of missiles upon the superciliary ridge or mastoid or zygomatic processes or possibly the occipital protuberance, or by grooving the sharp or shell fragments." Do you consider that sound doctrine?

A. Well, it applies most probably to gunshot wounds.

Q. Did you notice the expression "Either by projectiles of war or any other external violence"?

A. Well, I don't know who the author of that statement is.

Q. Don't you know that this work was prepared under the direction of the Surgeon General of the United States?

A. I know it was prepared under the direction of the army surgeons. A great many of them was not of much experience.

Q. You hav-n't much respect for this authority?

A. Quite a good deal; yes, sir.

Q. But you don't agree with the author in this conclusion?

A. I would not be compelled to because it was in that book. I would not feel compelled to because it was there.

Q. Don't you know that this is a collection of all the cases they were able to ascertain anything about of injuries that were received in the war of the rebellion and conclusions drawn from those cases?

A. I am aware of that.

Q. And would you not consider those conclusions to be very valuable in forming an opinion regarding the matter of surgery?

A. They are supposed to be.

Q. But that conclusion you don't think is correct?

105 A. I didn't say so. I said I was not able to say whether in the majority of cases that the inner table was fractured when the outer one was or not. I said I thought it was quite possible for the outer table to be fractured without the inner one.

Q. They had a good deal of experience in the war with that kind of fracture of the skull, didn't they, Doctor? You understand that to be the case?

A. I believe so.

Q. Do you consider, Doctor, that there is nothing the matter with Mr. Hawthorne now but the organic heart disease?

A. I think that is his principal trouble.

Q. What other trouble, do you think?

A. I don't know of any other.

Q. No other trouble. Suppose that he has pain in the head—persistent pain in the head—to what would you attribute that?

A. It might be attributed to heart trouble.

Q. Isn't it a prominent symptom of an injury to the brain—occasioned by a blow on the head such as he had—persistent pain in the head?

A. Yes, sir.

Q. And how does it result from heart disease—his persistent pain in the head—it is not very common?

A. It is not an ordinary symptom. People with heart disease don't usually have pain in the head, but I say it might be produced from that.

Q. But it is not at all likely that it is, is it?

A. I don't know. I don't say that Mr. Hawthorne is not suffering from something else besides heart disease. I say I don't know.

Q. You don't know of anything else, though?

A. I don't know of anything else.

Q. Isn't it a general rule that where there is pain there is inflammation?

A. No, sir.

Q. That is not the rule?

A. No, sir.

Q. Supposing him to have persistent pain in the head, from what you know of the case, to what would you attribute the pain, knowing the fact that he had received this injury?

A. It may be one of the remote effects of the injury on the head. I don't know.

Q. Suppose that the inner table had been injured, depressed, or injured in some way from the fracture of the outer table, what would be the result of that?

A. He would be very likely to have headache.

Q. All the time?

A. He might all the time, or nearly so.

Q. What would that headache be occasioned by?

A. Probably from direct pressure.

Q. Would it be probable he would ever get relief from it if the inner table was injured or depressed?

A. Not without surgical interference.

Q. Could an operation be easily or safely performed to relieve him from that?

A. Not very safely.

Q. The probabilities are that it would be fatal?

A. Probably.

Q. Would you regard a man who had a fracture of the outer table of the skull and a depression of the inner in such a manner as to cause persistent headache to be a very able-bodied man after that?

106 A. No, sir.

Q. You would not regard him to be a man (interrupted)——

A. He might be physically very well, but yet he would be incapacitated from work.

Q. He could not work? If you found a man whose skull you knew had been fractured in the outer table by a heavy blow and he had persistent pain in the head, whose health had absolutely failed, a man up to that time strong and well, wouldn't you attribute that pain in the head to a depression or injury to the inner table of the skull?

A. It would be rather a reasonable conclusion.

Q. And you would consider that that man from that injury was disabled if those were the facts and you knew no other cause for it; that would be a reasonable conclusion?

A. Suppose he had organic disease of the heart also?

Q. What would be your conclusion as to his condition, supposing he hadn't had any organic disease of the heart? Would there be any danger?

A. It is difficult to say. I don't know much about this lesion of the heart.

Q. What do you say?

A. Simply nothing at all what this might be. It is impossible to tell much about it—how extensive a lesion it was.

Q. Isn't dizziness or giddiness a very common symptom that follows a contusion of the skull?

A. Yes; also of heart disease.

Q. It is a symptom of both diseases?

A. Yes, sir.

Q. It is a very common symptom of a contusion of the skull, isn't it, Doctor?

A. Well, I should think it was a very common symptom following an injury to the skull—immediately following.

Q. And if it remained for a year or fifteen months you would be apt to consider that condition permanent, wouldn't you?

A. Yes, sir.

Q. And if this headache lasted that length of time you would be apt to consider that permanent?

A. If there was actual depression of the skull?

Q. Or if that was a fracture it would be very apt to be followed by headache and dizziness?

A. There might be a pressure from the presence of a fibrinous clot below the inner table, which might afterwards become absorbed, and it would be entirely relieved.

Q. On the other hand, it might increase?

A. Sometimes it is nearly or very nearly or entirely absorbed.

Q. Are those cases rare or frequent?

A. I don't think they are very rare. In appoplexy the blood clot is absorbed, leaving a clot of fibrin which is partly absorbed afterwards and the pressure is principally removed. It is perhaps a long time.

Q. Now, the numbness that has been referred to—to what would you attribute that? Heart disease?

A. Very likely.

Q. And would it not be also a symptom that would follow an injury such as I have mentioned to the skull?

A. I think that would be reasonable.

Q. It wouldn't be at all inconsistent with either the injury to the heart or to the head?

A. Well, I don't think it would.

107 Q. And isn't that numbness apt to result in paralysis?

A. No; I don't think it would. If the patient in this case had ever had paralysis he would have had it immediately after the injury. It is less likely after the lapse of time. The longer the lapse of time the less liability to paralysis.

Q. Suppose that numbness increased all the while gradually, what would be your conclusion in regard to paralysis?

A. I would think that it would be a symptom of organic disease of the heart.

Q. It would also be a symptom of injury to the brain?

A. I said so.

Q. Suppose it increased gradually, slowly, and constantly?

A. I think that would hardly be the case if it arose from injury to the brain.

Q. You think it would be the case if it arose from heart disease, from injury to the heart?

A. Yes, sir; if it was progressing.

Q. Explain the manner in which heart disease would cause this numbness.

A. By a weakened circulation.

Q. Would it weaken the circulation in any particular part of the body?

A. Sometimes.

Q. How does that happen?

A. It weakens the circulation in that part most remote from the heart.

Q. Most remote from the heart? Suppose it was on one side, how would your conclusion then be about the heart disease?

A. I should think it would not be on one side.

Q. The power of the heart, the power of this force-pump to throw the blood, decreasing, the circulation would diminish in the extremities first, wouldn't it, farthest from the heart; isn't that the result?

A. The force of the blood current is lowest farthest from the heart.

Q. The man would begin to die at the extremities?

A. Not usually.

Q. The circulation decreases all the while, doesn't it, at the extremities where the action of the heart is weakened; isn't that the fact?

A. I said the circulation, and especially in the weakened heart, was weakest the farthest from the heart.

Q. Then the weaker the heart grows, the circulation is weakened; the circulation extends further and further towards the heart and back from the extremities?

A. Yes, sir.

Q. That is what I meant by the expression.

A. That is not death, though.

Q. The failure of the blood to circulate is not death?

A. No.

Q. You think a man would get along very well if the blood did not circulate?

A. He gets along for a few minutes. In a dying man although you can't find the regular pulse the man is not dead.

Q. It is not necessary for the blood to circulate in order for a person to live?

A. You are asking foolish questions.

Q. Now, if this numbness was on one side, you would arrive at the conclusion that it did not result from heart disease?

108 A. I examined this man partly upon that subject, and I believe his power to grasp is about equal with his hands. He has about the same power on one side as the other.

Q. That is an argument, Doctor, and that branch of the case has been delegated to my learned friend here (pointing). I would like to have you answer the question.

A. I have answered the question a great many times that the symptom of numbness in the case of heart disease would not be apt to be unilateral.

Q. And would be apt or it might follow from an injury to the head or the skull or the brain?

The COURT: You have been over that, Mr. Haines, several times.

Mr. HAINES: I don't understand it so, if your honor please.

Q. Did you have him put out his tongue, Doctor?

A. Yes, sir.

Q. Did you notice anything peculiar about it?

A. At first I thought there was some deviation, and afterwards I thought there was none. I don't think there was any deviation.

Q. Doctor, isn't it a fact that the tongue was turning to one side?

A. I say I thought at first there was a deviation to the left, but after asking him to put it out again I thought there was not.

Q. Was that not commented upon by the physicians?

A. Yes, sir.

Q. Suppose he had a deviation to the left, what would that indicate?

A. It would indicate paralysis.

Q. Wouldn't that indicate that the muscles were stronger on one side than the other?

A. Yes.

Q. On which side would those be the stronger?

A. It would be strongest on the side opposite to where the deviation was.

Q. In other words, the muscles would be on the left side?

A. No. I thought the first time he put out his tongue the deviation was to the left. Afterwards I asked him to put it out several times, and I saw no deviation.

Q. You saw none the other side; but if there was deviation that would be conclusive?

A. The paralysis would be on the opposite side.

Q. How long do you think Mr. Hawthorne will live, Doctor?

A. I cannot answer that question.

Q. He may live fifteen or twenty years?

A. Very doubtful.

Q. What is your judgment about it?

A. My judgment is that he won't live ten or fifteen years.

Q. Do you think he will live six months?

A. He may. He is quite liable to live six months.

Q. Do you think he will live a year?

A. Possibly.

Q. But not probable?

A. He is quite liable not to.

Q. The man will never be able to do any work any more?

A. No, sir.

Redirect examination by Mr. McNaught:

Q. If you had been permitted to examine the head and wound more probably you could have known much more definitely concerning that, could you not?

A. Yes; we were not allowed to examine the wound.

109 Q. And you say that if the paralysis had been the result of the injury in the head by this wound it would probably have shown itself much earlier?

A. Yes, sir; it would be more likely to show itself immediately after the injury than afterwards.

Mr. McNaught: That is all.

Mr. Haines: That is all.

Dr. J. S. M. Smart called as a witness for the defendant and sworn.

(By Mr. McNaught:)

Q. Dr. Smart, what is your profession?

A. Physician and surgeon.

Q. How long have you been practicing as such?

A. A little over ten years.

Q. Of what college—what medical college—are you a graduate?

A. Bellevue, New York.

Q. How long have you been practicing in Seattle?

A. A little over four years.

Q. Did you ever examine the plaintiff in this case—Mr. Hawthorne?

A. Yes, sir.

Q. When did you make the examination of him?

A. Yesterday.

Q. Where?

A. At his residence.

Q. Who was with you at the time?

A. Drs. Smith and Minor.

Q. What organic disease, if any, did you find him suffering with?

A. Organic disease of the heart.

Q. Well, in what condition did you find him?

A. In the breaking-down stage, I should conclude, from the history of the case; beginning to break down a little.

Q. How distinct or plain was the murmur?

A. It was very plain to me. I could hear it very distinctly.

Q. Did you examine the wound upon his head?

A. Well, partially so; yes, sir; we looked at it.

Q. Why didn't you examine it thoroughly?

A. I didn't see any symptom of brain trouble. I shouldn't judge from the appearance of the scalp that it was a very serious thin*k*, so I turned my attention to the heart.

Q. You didn't see anything to lead to the conclusion that there was brain trouble at all, then?

A. No, sir.

Q. Who examined his head first yesterday?

A. I did.

Q. What experience have you had, Doctor, in heart disease?

A. The same as an ordinary physician, I guess; as a general practitioner; I guess there ain't much difference.

Q. What would you say, Doctor, was the probable duration of the life of a man suffering with heart disease, as this plaintiff is, in a breaking-down stage?

A. Oh, I could not say that. He might die to-day, when he might live five or six years.

Q. Liable to die at any time?

A. Yes, sir. I could not insure his living any great length of time.

Q. Is there any connection, Doctor, with the injury that you saw on the head or the blow that caused the injury upon the head and the organic heart disease?

A. I didn't see any.

110 Cross-examination by Mr. HAINES:

Q. Organic disease of the heart, Doctor, is sometimes occasioned by concussion, is it not—sudden fall?

A. I believe it is so reported, but I have never seen any organic heart disease produced by it.

Q. How many years have you been practicing medicine?

A. A little over ten.

Q. Still those cases are known?

A. I believe they are reported. I have never seen one.

Q. What kind of a murmur did you say this was?

A. Organic murmur.

Q. What?

A. It is organic murmur, a murmur indicative of organic disease of the heart.

Q. What did you say?

A. There was a murmur indicative of organic disease of the heart.

Q. Is that the only classification of heart murmurs that you can give—organic and inorganic?

A. Yes, sir; organic and inorganic.

Q. How many distinct murmurs of the heart are there?

A. Well, it has two.

Q. What are they?

A. The first and second sounds of the well heart, and then you might have a variety of causes. I couldn't count them all.

Q. Are murmurs classified in medicine?

A. Well, they ain't classified, that I know of. It is a murmur in connection with the valve.

Q. There is no way of distinguishing one murmur from another by any medical or technical term?

A. I don't understand.

Q. Are murmurs all alike—of the same kind?

A. Not all alike.

Q. How many kinds are there?

A. They are all called murmurs, but the sounds are not all alike.

Q. Is there any classification made of murmurs of the heart according to sound?

A. No; I don't know of any classification.

Q. You never heard of any such thing?

A. No, sir; I never heard of their being classified at all.

Q. Do you know what causes this murmur?

A. I think I so.

Q. What?

A. It is regurgitation of the blood from the left ventricle into the left auricle.

Q. Did you examine the carotids?

A. No, sir.

Q. Did you examine the patient when he was lying down?

A. No, sir.

Q. Why not?

A. I didn't think it was necessary.

Q. Suppose you had discovered that there was no murmur when he was lying down, would that make any difference in your conclusion?

A. I couldn't discover that; it is impossible. You might stand him on his *dead* and the murmur would be there.

Q. Did you ever try it?

A. No, sir.

Q. It is your conclusion, though?

A. Yes, sir.

Q. Do you know whether Mr. Hawthorne's heart is of normal size and in the proper position?

A. I couldn't say that; no means of ascertaining. I had no stethoscope. I didn't strain him.

111 Q. You couldn't tell whether it would be in the proper position from the examination you made?

A. I couldn't say. There might have been some enlargement. There might have been some dilatation. I could not say. I should expect some from the loud murmur.

Q. Would that change the position of the heart?

A. It would a little.

Q. Could you explain to the jury about the proper position of the heart?

A. Yes; I guess so.

Q. Will you explain?

A. The heart lies here (pointing on his own person), about like this. It is of conical shape, and the point of the cone is down about like this (showing).

Q. Could you give the location of the valve where this murmur was and of the other valve?

A. The murmur is between the left auricle and the left ventricle, in the mitral valve. It is between the auricle and the ventricle and it is on the left side of the heart.

Q. On the left side of the heart? It is about the middle of the heart?

A. A little above the middle.

Q. Are murmurs ever heard in any other parts of the heart except that place?

A. Yes, sir.

Q. What places?

A. ——.

Q. What causes disease of the valves of the heart?

A. There are several causes. Rheumatism is a frequent cause. There is some we don't know what causes them.

Q. You don't know?

A. No.

Q. They are caused by sudden excitement, aren't they?

A. I could not say that they are.

Q. Aren't they caused by sudden falls or sudden exertion?

A. I have never seen one.

Q. Isn't, it, Doctor, as a matter of fact, very difficult to tell what the causes of organic diseases of the heart are?

A. Well, unless it is rheumatism that has been going on for some time and disease of the heart comes on; I should expect it was rheumatism.

Q. But organic disease of the heart is often and generally of slow growth, isn't it?

A. Yes, sir.

Q. And from the nature of the disease isn't it almost impossible to tell the actual cause of it in the first instance?

A. I can't tell the actual cause.

Q. Isn't that a well-understood fact in medicine and surgery?

A. Well, in some cases it is; yes, sir.

Q. Well, isn't that general? Isn't it well understood that it is very difficult to tell the actual starting point of organic disease of the heart?

A. Yes, sir; it is.

Q. You say you saw nothing that indicated that this wound on the head amounted to much?

A. Only a scalp wound.

Q. Only a scalp wound? If you ascertained that that wound was made by a wheel weighing forty or fifty pounds, falling a distance of eight or nine feet, would you still say that there was nothing to indicate that it was at all serious?

A. I might; yes, sir.

Q. Suppose that the man who received that wound, Mr Hawthorne, had been an active, vigorous man, accustomed to hard work, earning his living by manual labor, up to the age of 45 years, and
then received that wound, and from that time he was unable
112 to work or take any other physical exercise other than walk
a few blocks or something of that kind, and was troubled with constant pain in the head, would you consider that he had received any injury from this blow on the head?

A. I should think, from the appearance of the wound, while he received an injury in the head, that that was a scalp wound.

Q. But would you consider that he had received any permanent injury?

A. I would not if I could not find out some other cause, only his general debility and breaking down.

Q. If you found that his heart was in that condition you would not reason that he had received any special lasting injury from the fall of that wheel?

A. No; not with those symptoms. I would rather think the heart disease predominated.

Q. Would you think that would be the case if the person didn't have the injury on the head?

A. It might be.

Q. Wouldn't it be rather an unusual thing that it should be caused by the heart disease if he had this blow on the head and his injury dated from that day?

A. Yes, sir; I would, but, as I understand, Mr. Hawthorne didn't suffer all the time.

Q. I am asking you the question.

A. It would be rather unusual.

Q. Suppose that he had had this persistent pain in the head most all the time from the time he received the injury, to what would you attribute it?

A. After the examination I made I should attribute it to some heart trouble.

Q. And you think that the fact that he had none of this trouble, that he had been apparently a perfectly able, healthy man, able to do his regular day's work up to the day of the injury—you think that that wouldn't cause you to feel at all doubtful, but that his whole difficulty arose from heart disease?

A. I should expect this heart trouble to get a little worse, but I think the heart was the cause of it, though.

Q. This is often the case, that a person has organic disease of the heart and is unconscious of it until some sudden excitement comes on to develop it?

A. Well, they might drop dead and never know it.

Q. You have known that to happen?

A. Frequently.

Q. People are entirely unconscious that they have any disease of the heart?

A. Yes, sir.

Q. But a sudden excitement will cause them to drop dead?

A. Not necessarily sudden excitement.

Q. But still that has been known under those circumstances?

A. Yes, sir.

Q. And a fall sometimes produces that result?

A. I don't know that I ever read that a fall produces it particularly.

Q. Suppose a person who had organic disease of the heart should be suddenly struck and knocked down senseless, it would be very apt to excite the disease?

A. It would excite the symptoms.

Q. Suppose a person never had been conscious of having heart disease up to that time and very suddenly he developed heart disease, he might do it within two or three years?

113 A. I don't think he would develop the heart disease. He might have had it before and not recognize it. I don't think it would cause heart disease.

Q. But it would aggravate it so he would become conscious of the fact that he had the disease?

A. It might and it might not.

Q. It might?

A. Yes, sir.

Q. It would not be a very singular fact if it should, would it?

A. No, sir.

Q. And the fact that the man had never been troubled at all with heart disease, never had had any of the symptoms of heart disease, and was apparently perfectly well up to the time he received the sudden blow, and those symptoms developed very rapidly afterwards, would you not come to the conclusion that the blow had very much aggravated the heart disease?

A. Yes; if the symptoms had developed themselves; but the symptoms didn't develop in this case.

Q. How do you know that?

A. I had their words for it. I don't know. I heard Dr. Miller's testimony, and I shouldn't think they developed very rapidly.

Q. You think you know all the facts in the case?

A. I am trying to tell you as well as I can.

Q. I am asking you this question. Supposing the symptoms were developed since the blow and hadn't been apparent—that is, to the knowledge of the person who received the blow up to that time—supposing that to be the case, then you would say that the blow had aggravated the disease, wouldn't you?

A. Yes, sir; I should think it would.

Q. You say there was no indication of brain trouble?

A. I meant to say not any serious trouble of the brain.

Q. Was there any indication of any trouble of the brain?

A. No more than the imperfect circulation that I could see.

Q. What did you say?

A. No more than the irregular circulation from the heart disease.

Q. Would you call that brain trouble?

A. I should think so.

Q. Was there any indication of any injury resulting from the blow on the head?

A. I couldn't see any.

Q. Suppose the blow had fractured the outer table, would that make any difference in your conclusion?

A. No, sir.

Q. Suppose it had depressed the inner table, would that make any difference?

A. Yes, sir.

Q. Then, as a matter of fact, if the blow had fractured the outer table and depressed the inner table you think Mr. Hawthorne's condition would indicate brain trouble?

A. Yes; I should think so; very well marked before this.

Q. The symptoms—the difficulty that he seems to be suffering now—suppose that he had received that injury, wouldn't you attribute some of that to the injury and not all to the heart disease?

A. Well, I might attribute some of that pain in the skin to the injury; maybe some of the sensitiveness around the cicatrix there, but, as I understand his wife, he did not suffer from any pain in the brain; it was principally in the skin outside, and she would not allow us to touch it.

114 Q. You understood from Mrs. Hawthorne that the pain was in the skin?

A. She said she was afraid to let us touch it.

Q. You didn't understand her to say any pain in the head or inside?

A. I didn't understand that from her.

Q. If you had understood that, would it have made any difference in your conclusion?

A. I don't know that it would.

Q. You would still attribute it to the heart disease?

A. Yes, sir.

Q. Persistent pain in the head is one of the most frequent signs of heart disease?

A. Not persistent pain in the head.

Q. But pain most all the time in the head would be a symptom of heart disease, wouldn't it, Doctor?

A. Not necessarily so.

Q. Wouldn't it be necessarily a symptom of some injury to the brain or skull?

A. I should certainly think it was some stomach trouble; but constantly all the time it might have been in the head.

Q. What do you understand by persistent pain in the head?

A. Continuous; all the time; never letting up, not for a moment.

Q. What would you consider that a symptom of in Mr. Hawthorne's case, if he had a pain of that kind, Mr. Hawthorne receiving that injury?

A. I should judge it was produced by the injury.

Q. If this injury had been such as to depress the inner table, and it was followed by a persistent pain in the head, would you consider that to be a serious injury?

A. I would.

Q. Would you consider that to be a permanent one?

A. I would.

Q. Would you consider that such a man would ever be able to work again at manual labor?

A. No, sir; I should not think he would.

Q. Would that have any effect on his probable length of life?

A. I should judge so.

Q. To shorten it?

A. Yes, sir.

Q. You regard Mr. Hawthorne as being in the breaking-down stage?

A. I did not think he would live very long. I should not be surprised to hear of his death most any time.

Q. You testify that he will never be able to work?

A. I don't think he will.

Q. A pretty sick man, isn't he?

A. Yes, sir.

Q. How long were you there when that examination was made?

A. I did not look; I could not say.

Q. About how long?

A. Probably half or three-quarters of an hour.

Q. Did you make any examination of him to-day?

A. No, sir; I have not seen him since, and I never saw him before.

Q. Don't heart murmurs result sometimes from long illness when the patient becomes feeble and the blood poor and the heart is not sufficiently supplied with nutriment or stimulants in the blood?

A. Yes, sir.

Q. If a person has been ill for a year or so, and in the condition I have mentioned, heart murmurs are not unusual?

115 A. Well the organic would be, the anæmic would not.

Q. What is the difference?

A. The anæmic murmur is produced from the condition of the blood. The organic murmur is produced from the weakening of the valves, allowing the blood to regurgitate. The condition of the blood has nothing to do with the murmur in organic diseases, but it has all to do with the anæmic murmur.

Q. What is the difference in the two?

A. They are heard in different places. We look over the base of the heart for the anæmic murmur and in the carotids. In the valvular murmur it is not heard as loud over the base of the heart as it is in the apex, and this is transmitted around the left side, which the anæmic is not.

Q. If the heart was not in the proper position would you not be apt to be misled as to the location from this murmur?

A. I don't think so. I think I could locate the apex of the heart.

Q. How? With a stethescope?

A. Yes, sir.

Q. Is there any difference in the loudness of the anæmic murmur and the murmur indicating organic heart disease?

A. Well, the organic is the loudest.

Q. Do you know whether when the patient lies down the anæmic murmur can be heard?

A. It might disappear.

Q. Then if the murmur was heard when sitting up and not heard when lying down you would consider that it was an anæmic murmur and did not indicate organic disease of the heart?

A. Yes, sir; if it was heard when he was sitting up and was not heard when he was lying down.

Q. And if a man had been lying sick and unable to move about or exercise and not a very good appetite and got weaker, as Mr. Hawthorne is, an anæmic murmur of the heart would not be at all strange for him to have?

A. No, sir; I don't think it would.

Redirect examination by Mr. McNaught:

Q. You say, Doctor, that he is a very sick man at this time. What do you attribute that sickness to?

A. To heart disease.

Q. Organic disease of the heart?

A. Organic heart disease.

Q. You say if there was any depression or fracture of the inner table there would probably have been more evidences of brain trouble than there are at this time?

A. I should judge so; yes, sir.

Mr. McNaught: That is all.

Second cross-examination by Mr. Haines:

Q. Upon what do you base that opinion, Doctor?

A. I base it upon the fact that the fracture of the internal table is a very serious thing, and the fracture of the external table is a very common thing without any very serious results following it.

Q. You say the fracture of the external table is very common?

A. Yes, sir.

Q. Without any serious results following it?

116 A. Without any serious results following it. You wait a time for it to heal up, and after it is well there is no bad effects.

Q. Did you hear the extract I read from the Medical and Surgical History of the War to Dr. Smith?

A. I didn't pay much attention to it.

Q. You are familiar with that work, ain't you?

A. Not very familiar. I have read it over some.

Q. Do you consider that good authority among physicians?

A. Yes, sir.

Q. Would you be inclined to dispute this proposition made by the author of that work: "I am disinclined to admit that the outer table of the skull is ever fractured in the adult without injury to the inner table, either from projectiles of war or from any other external violence, except in rare instances"?

Mr. McNaught: I believe I will object to that question, if the court please, as being immaterial and not proper cross-examination.

The Court: The witness may answer.

Mr. McNaught: We except.

The Court: Exception allowed.

A. What did you say?

(The last question read to the witness by the reporter.)

A. Well, I think that has reference there to missiles of war. He says it does partly, and merely because he says it is so would not make me change my mind any.

Q. Don't you know that it treats of injuries received in railroad accidents, and that there is a classification in this work in that connection?

A. He says there missiles of war.

Q. What would you understand from this expression: "Or any other external violence"? Would you think that was limited to missiles of war?

A. I should think so when he mentions missiles of war.

Q. If he intended to include anything but missiles of war, then you would disagree with him?

A. Sir?

Q. If he intended to include anything but missiles of war, then you would disagree with him, would you?

A. I certainly should.

Q. You would consider yourself better authority on that subject than this book?

A. Well, I know what I see myself.

Q. Have you had any large experience with this class of cases?

A. I have had a great many of them.

Q. You think you have had as great an experience as is collated in this series of books?

A. No, sir; I do not.

Q. Wouldn't you be a little more inclined to rely on the experience of these surgeons than you would on your own?

A. No, sir; I would not, particularly so in this instance.

Mr. HAINES: That is all.

Mr. MCNAUGHT: That is all.

117 1.30 P. M.

WILLIAM CAMPBELL called as a witness for the defense and sworn.

(By Mr. MCNAUGHT:)

Q. Mr. Campbell, what is your business?

A. Machinist.

Q. How long have you been engaged in that business?

A. 28 years.

Q. Where are you working now, if any place?

A. At the Columbia and Puget Sound R. R. Co.

Q. Are you acquainted with the mill known as the Columbia and Puget Sound mill, in Seattle?

A. Yes, sir.

Q. How long have you been acquainted with that mill?

A. Since ever it was built.

Q. When was it built, Mr. Campbell?

A. About '78 or '79. I could not say exactly which.

Q. By whom was that mill constructed?

A. J. M. Colman.

Q. What position do you occupy now in that mill?

A. Master mechanic of the road.

Q. Master mechanic of the road?

A. And machinery.

Q. And machinery?

A. Of all the machinery.

Q. Are you acquainted with a machine in that mill known as the trimmer?

A. I am.

Q. How long have you known that machine?

A. Since ever it was put up.

Q. When was it constructed?

A. Sir?

Q. When was it put up?

A. When the mill was built.

Q. Describe to the jury how that trimmer is constructed, Mr. Campbell.

A. Well, it is a hanging trimmer. There is a shaft that the pulleys is on that lies at right angles to the driving shaft, lies parallel to the driving shaft, and the saw arbor lies at right angles to the driving shaft. The belt is carried over the pulleys at a slight angle from the driving pulley down onto the saw arbor; that is all the construction. The pulleys is carrier pulleys. They transmit the power.

Q. Why the angle?

A. On the pipe?

Q. Yes.

A. It is required on the pipe for the belt so that the belt travels on the pulley.

Q. You spoke of a pipe. What is that pipe?

A. It is a piece of heavy gas pipe or steam pipe. It is used as steam pipe or gas pipe; but there is different kinds of pipe. Some is heavier than others.

Q. This is heavy?

A. Yes; it is heavy.

Q. How long has that piece of pipe been in that mill?

A. Since the mill was built.

Q. Were there any changes made in the structure of that pulley from the time the mill was first constructed, in 1878 or '9, down to the time of the injury?

A. Not that I am aware of. There might have been. The collars, I think, since the mill was built—I shrunk the collars on to hold the nuts so they could be screwed up very good and solid without bursting the caps. I put collars on the nuts $\frac{5}{8}$ or $\frac{1}{2}$ inch square iron, so that they could be screwed up solid. We screwed them up with a pair of pipe tongs, about a three-foot lever.

118 Q. What was the cause of this pulley coming off at the time it did when the plaintiff received the injury complained of here?

A. It was the jar of the pulley.

Q. What caused the jar of the pulley?

A. The babbitt must have been melted out or run out some way and the pulley jarred on the nut.

Q. Is there anything else that would cause that pulley to come off except that which you have mentioned?

A. Not that I know of.

Q. If that nut was properly screwed on and the pulleys properly babbitted and kept oiled what, in your opinion—was that machine safe or unsafe?

A. Safe as long as in that condition.

Q. Q. Safe as long as in that condition—as long as it was properly cared for, then, and looked after it was safe machinery?

A. It was safe as other machinery.

Q. Safe as other machinery?

A. As other machinery.

Q. How much play is there between the nut and the pulley?

A. I couldn't say how much play there is. We generally allow three-sixteenths. There might be a little more with wear.

Q. Has this pulley as constructed, when it is kept properly oiled and attended to—is there any friction?

A. Very little.

Cross-examination by Mr. HAINES:

Q. What position, Mr. Campbell, do you occupy now?

A. Master mechanic.

Q. How long have you occupied that position in that mill?

A. For two or three years.

Q. What position did you occupy before that?

A. Machinist.

Q. Have charge of the machinery?

A. Hadn't charge, except they would refer to me when Mr. Colman was gone any place.

Q. You acted in his place whenever he was not there?

A. So far as machinery was concerned I did.

Q. Have you not been master mechanic ever since the present company took hold of the mill?

A. Well, I can hardly tell whether I was or not. I was foreman all the time, in charge of the machinery.

Q. That is all you had charge of, the machinery?

A. Yes, sir.

Q. And made repairs whenever you noticed it?

A. Yes, sir.

Q. At least that was your duty?

A. Yes, sir.

Q. How long after Mr. Hawthorne was injured did you see the pulley, Mr. Campbell?

A. It must have been perhaps an hour after.

Q. You had something to do with building the mill, didn't you?

A. I had.

Q. That mill was put up in considerable of a hurry, wasn't it?

A. Well, it was put up in the course of a hurry.

Q. The machinery was put together somewhat hurriedly, and this gas-pipe shaft was rather an unusual way of constructing a machine of that kind?

A. It is rather unusual.

119 Q. A sort of make-shift; considered so at the time?

A. I expect it was.

Q. Isn't that a fact, Mr. Campbell, that when that trimmer was put in it was intended that it should remain permanently, but that it was just temporary; the intention was to replace it with something more substantial?

A. Not that I know of.

Q. You don't know anything about that?

A. I do not.

Q. You didn't understand that from Mr. Colman?

A. No, sir.

Q. This gas pipe—that was just a piece of gas pipe that was taken from ordinary gas pipe? It was not cut for the purpose?

A. I could not say.

Q. Did you put up that trimmer?

A. I did not.

Q. Who did the work on it?

A. Mr. Colman superintended it himself. I done some work on it. I turned the pulleys and babbitted them. He put it up himself—him and another carpenter. I don't know which carpenter.

Q. Are you acquainted with Mr. Al. Spaulding? You know Al. Spaulding?

A. I do.

Q. Did he have anything to do with putting it up?

A. He did not.

Q. He was working there at the time?

A. He was working there.

Q. How long was it, did you say, that you saw this pulley after Mr. Hawthorne was hurt?

A. About an hour, as near as I can recollect.

Q. Where was the pulley when you saw it?

A. It was lying upon the floor of the mill, right opposite the trimmer, or thereabouts. I think it was on the floor of the mill I saw it.

Q. Did you examine the pulley?

A. I did.

Q. You say that the pulley was worn; looked as if it had been dry?

A. Yes; looked as if it had been dry.

Q. Why do you use the expression "looked as if it had been dry"?

A. Well, anybody would use an expression of that kind if they looked at anything.

Q. You say that it was dry, I understand?

A. That is the first thing I looked at in the machine.

Q. There was no oil on the side of the pulley at all?

A. On one side. On the other it was dry, and the other seemed as if it had been oiled.

Q. Inside?

A. I could not say which side.

Q. There was a hole through the pulley where the shaft runs?

A. No holes in the pulley.

Q. None at all?

A. No, sir.

Q. How does the pulley run around the shaft?

A. There is a hole in the pulley.

Q. Don't it go clear through?

A. Of course.

Q. Do you remember any oil in there?

A. There was oil in one part of it, it seems to me.

Q. And not in the other?

A. In the other it was dry.

Q. In this same part—the hole where the shaft went in?

A. Yes, sir.

Q. Didn't that strike you a little singular?

A. No.

120 Q. How would you explain that?

A. It was the oil—clogged oil. I expect there was no oil put in there. It couldn't travel in on the pulley and it wore dry.

Q. And isn't it true that any pulley will heat and wear dry?

A. No; it is not true. It is impossible to work any other way.

Q. What would cause it to wear dry in one part and carry oil in the other?

A. That is more than I can say.

Q. That passes your understanding, so far as mechanics is concerned?

A. Yes, sir.

Q. You say it required babbitting?

A. Yes, sir.

Q. What did you see about it that made you think that?

A. The hole was too big.

Q. This babbitt metal is to make it fit closer to the shaft?

A. You can't run a loose pulley without babbitt metal. There is no other metal that will stand.

Q. But from the time this trimmer was put up by Mr. Colman down to the time of the accident occurred no changes were made?

A. Except as I state.

Q. Are you certain that those changes were made?

A. Yes, sir.

Q. What were they?

A. Collars shrunk on the nuts for to strengthen the nuts so as to tighten them up good without bursting the nuts.

Q. That was a collar right around this cap?

A. Right around the edge of the cap—the open edge of the cap.

Q. And you had to screw it up with pipe tongs three feet long?

A. Yes, sir.

Q. You couldn't get hold of that with a wrench, could you?

A. No, sir.

Q. Didn't you sometimes use a cold chisel or a hammer?

A. No, sir.

Q. Isn't that pulley marked where it has been forced around with a cold chisel and hammer—not the pulley, but the cap—where a cold chisel has been set in?

A. There is nobody can tell that is a cold chisel.

Q. Is it the pipe tongs?

A. Yes; the cutting ends of the pipe tongs.

Q. But there are marks there?

A. Of course there is or you could never screw it up.

Q. Don't they look like the marks of a cold chisel?

A. Just exactly.

Q. Just exactly. A man who went to that and didn't know that it had been screwed up with pipe tongs would be apt to think that was screwed up with a cold chisel, wouldn't he?

A. He would.

Q. You think this nut was forced off by the babbitt being out of the pulley?

A. I think that was the principal cause.

Q. And as long as the machine was kept properly babbitted you think it would be all right?

A. I think it was always considered safe when babbitted and in good order.

Q. There would be some friction, even if it was oiled between the pulley and the cap, wouldn't there?

A. There would be; yes.

Q. When the pulley was pushed back the saw would slide down against the cap?

121 A. But the (interrupted)——

Q. Answer that question. Isn't that so?

A. Sir?

Q. When the saw was let back from the work that would dip the shaft at an angle of about 15 or 20 degrees, and the pulley would slide down onto the cap?

A. Yes; if there was no belt on it it would, but not with the belt.

Q. Would the belt keep it back?

A. Yes, sir.

Q. As long as the belt remained on the pulley it would not rest on the nut?

A. But very little. *Ut* has a tendency to pull off on the shaft, because the belt takes from the horizontal shaft over that shaft like that (illustrating).

Q. Would the pulley stay on if the nut was off?

A. That I could not say.

Q. What is your opinion about that, as a mechanic?

A. I don't think it—I don't think so, because the belt is not very tight on the pulley. It would be liable even when it was tipped back to slide off.

Q. That would make it rest on the nut?

A. But very little.

Q. Very gently?

A. I don't know.

Q. If there was oil on there there wouldn't be any friction?

A. There is more or less friction, anyway, whether there is oil or not.

Q. As a machinist, don't you know that there is always friction at the bearings of machinery?

A. I do.

Q. No matter how much oil you put on?

A. I do.

Q. Does not a great deal depend on the quality of the oil as to how long it will remain on the bearing?

A. It does.

Q. Poor oil will wear out a good deal quicker than good oil?
A. Yes, sir.

Mr. Haines: That is all.
Mr. McNaught: That is all.

J. M. Colman called as a witness for the defendant and sworn.

(By Mr. McNaught:)

Q. Mr. Colman, what is your business?
A. I am a machinist by profession.
Q. How long have you followed that business?
A. For some 30-odd years.
Q. Are you acquainted with the mill known as the Columbia & Puget Sound saw-mill?
A. Yes, sir.
Q. Located in the south part of Seattle here. Who constructed that mill?
A. It was constructed under my supervision.
Q. In what year?
A. Well, somewhere in '81 *of* '2. I don't remember now.
Q. '79?
A. It might be that.
Q. You don't remember the date of the construction?
A. I don't remember the date of the construction; somewhere about '80.
Q. Do you remember the construction of the trimmer in that mill?
A. The original construction I remember.
Q. How was that construction, Mr. Colman?
A. Well, it was constructed as most hanging trimmers are, with the exception that the belts were turned on two idle pulleys
122 Q. How long did you run that mill?
A. Some three years or more; between three and four years.
Q. Was this trimmer in the mill all the time?
A. Yes, sir.
Q. And in operation? What in your opinion was that machinery, Mr. Colman? Was it an ordinary or reasonably safe piece of machinery?
A. I thought so when I put it up. I didn't see any reason to change my mind all the time I run it.

Cross-examination by Mr. Haines:

Q. Mr. Colman, you put this mill up in something of a hurry, didn't you?
A. Yes, sir; I have done a good deal of work in a hurry.
Q. You generally work in a hurry, don't you?
A. Yes, sir.
Q. But this was rather an unusual hurry in this instance?
A. Not particularly so. The first of the mill was to get to sawing, but, so far as this trimmer was concerned, we were not in a

hurry to get it up any more than any other piece of machinery; nothing particular about that.

Q. Was that included in what you say you put up in rather an unusual hurry?

A. No; it was not.

Q. Was this trimmer intended to be a permanent affair or simply temporary until you could get something else?

A. That was intended as permanent at the time it was put up.

Q. What did you say—was that a permanent structure?

A. I intended it as a permanent trimmer.

Q. Was it intended as a permanent structure?

A. Yes, sir.

Q. Wasn't that intended just to do duty for two or three years until you got something in there more suitable for the purpose?

A. I made no calculation of anything different at the time it was put in.

Q. Didn't you have a conversation with Mr. McMicken about this trimmer?

A. I don't remember having any particular conversation with anybody about it.

Q. Didn't you state to him that this was put up there temporarily; it was not intended that that should remain there 7 or 8 years?

A. I did not figure on the time it should remain. It was not probably as permanent a trimmer as I would put into a heavy mill, but for that size of a mill it was suitable for the purpose.

Q. Has the mill been enlarged any since you built it?

A. I don't know. I have not been in the mill for the last two years. I don't know whether they have made any changes.

Q. You don't think that you stated that trimmer was put up there for a temporary purpose?

A. I don't know that I did. It was put up with such machinery as I had at hand at the time. I considered it a permanent thing or I wouldn't have put it up. It was built under my supervision.

Q. Don't you remember, in speaking of that trimmer as I mentioned, of using this illustration: "A man makes a boom of piles
123 fast with a hawser; that is good enough for the time being,
but he don't expect it will stay for five or six years"? Do you remember using that expression?

A. No; that brings to my mind that I had a conversation with some one. I didn't know it was Mr. McMicken.

Q. You remember that?

A. Yes; I had that conversation with him. I said, "You might use a rope for a pile-driving hammer, and when it was put on it was perfectly safe; but there would a time come when it would not be. So it was with that piece of machinery." Any piece of machinery will wear out in time.

Q. You considered that an ordinarily safe machine?

A. I did.

Q. Under all circumstances?

A. Yes; under all circumstances that it was intended to be used for.

Q. Was it constructed in the manner in which trimmers are usually constructed?

A. I don't know particularly that it is; there is so many different forms of trimmers. I have seen them constructed on similar plans, and I have constructed them on similar plans.

Q. You have constructed them on other plans?

A. Yes, sir; it depends on other machinery in the mill.

Q. Was this mill built for yourself when you built it?

A. Yes; built for a corporation in which I was interested, anyway.

Mr. Haines: That is all.

Mr. McNaught: That is all.

Dr. Rufus Willard recalled as a witness for the defendant.

(By Mr. McNaught:)

Q. Doctor, what is your profession?

A. Physician and surgeon.

Q. Of what school, if any, are you a graduate—what college?

A. I am a graduate of several. The University of New York was the first I graduated from.

Q. How many years have you been practicing your profession, Doctor?

A. About 26 years.

Q. How many in Washington Territory?

A. All that time in Washington Territory except the time I was absent in my course of study.

Q. How long in Seattle?

A. Very near 7 years.

Q. Have you ever made any examination of Mr. Hawthorne, the plaintiff in this case?

A. I have; yes, sir.

Q. When did you make that examination?

A. To-day.

Q. Who, if any person, was present at the time of that examination?

A. Dr. Weed was present and Dr. Miller was present, and the family.

Q. And the family?

Q. I think Dr. Kreigk was present.

Q. Did you find any organic diseases troubling the plaintiff?

A. I did.

Q. What was it, Doctor?

A. Valvular disease of the heart—the mitral valve.

Q. Was the murmur such, Doctor, that you could hear it plainly and distinctly?

A. Very distinct, sir. I never heard one more so.

124 Q. What experience have you had in examining persons with heart disease?

A. Well, I have had a very large experience, especially since I have been in this town in connection with the hostital; a very large experience.

Q. How long have you been attending at the hospital here as a physician?

A. Ever since I have been in the city.

Q. 7 years?

A. Yes, sir.

Q. You have made that a specialty to a great extent?

A. Not a specialty, but a large experience. I have had a great number of cases in the hospital that don't fall under the observation of private practitioners generally. Of course I have seen a great many cases in ordinary practice, but more, I think, since I have been here.

Q. Did you examine the wounds on the head of the plaintiff?

A. Well, not carefully. I noticed them. I observed where they were, so as to notice the scar. There was not much to see about them. It was simply a scar on the scalp. He complained, of course, of some sensitiveness as we examined.

Q. What stage of the heart disease did you find the plaintiff suffering under, if it can be defined as a stage or degree?

A. Yes, it is difficult to say. I don't think there was any dilitation. It was not in the last stage.

Q. Not in the last stage?

A. We generally have a condition of hypertruphy for the first condition, and until there is a further complication of the difficulty the heart is able to act fairly; but when the next stage comes, that of dilitation, there is greater sluggishness and greater danger. I should judge he — just about approaching, and may be passing, into that stage. That would be my conclusion.

Q. Is there any way that you could account for the complaint of pain in the head or dizziness as arising from the heart disease or connected with the heart disease?

A. Oh, yes; nothing more common than dizziness or paralysis, or anything else of that kind, than those things arising from heart trouble.

Q. Does organic disease of the heart ever produce organic disease of the brain?

A. It does.

Q. Does organic heart disease result, and did the organic heart disease in this case, in your opinion, result from the blow that Mr. Hawthorne received on the head?

A. I don't think so. It is not necessary to account for it in that way. It would hardly be probable.

Q. Did you discover any paralysis in the patient—in the plaintiff?

A. Well, not marked paralysis. There was some, of course. It would be difficult, as a physician is placed in examining, to tell just whether it was paralysis; how far there was a condition of paralysis. By the grasp of his hands, for instance, of course it would be entirely in his own power to grasp hard or less firm, just as he pleased, and it would be impossible for the physician to say what was the degree of the paralysis. That might be indicated should he seem to be weaker. He seemed to be weaker in one hand than the other.

125 Q. How soon, Doctor, would paralysis ordinarily commence caused by a blow on the head?

A. Caused by a blow upon the head?

Q. Yes.

A. Well, that would depend on the circumstances. If the blow was such as to break a vessel and considerable blood effused I should say it might be almost immediate. If the blow was such as to set up inflammation and the paralysis was the product or the result of the inflammation it might be days or weeks, and then, on the other hand, years might pass away before any such paralysis would come on as the result of the blow.

Q. How soon ordinarily would paralysis commence if the blow was sufficient to fracture the outer table and cause a pain—cause a constant pain, continuing for a year or a year and a half?

A. It is not necessary that there should be any paralysis from a fracture of the outer table. It is not necessary that there should be any paralysis at all. There must be injury to parts below on the brain before paralysis appears.

Q. If there is no fracture except that at the outer table it is not necessary that paralysis should follow?

A. No; when there is no injury to the vessels. Of course, there might be a blow that would inflict an injury to the vessels, what we might call a fracture of the vessels, and yes no sign of a fracture of the skull. Just a jar might fracture the vessel.

Q. Did you see any evidence of suffering from injury in the wound—from the wound?

A. Only from his own complaint and sensitiveness in pressing it.

Q. The evidences, then, that you saw were the result, in your opinion, of the organic disease of the heart?

A. Well, I (pauses)—certainly the heart trouble would account for it.

Q. For it all?

A. I would not like to say that it did not arise from the blow, but the heart trouble would account for it.

Q. For everything you saw?

A. For all I saw; yes, sir.

Cross-examination by Mr. Haines:

Q. You found valvular disease of the heart, Doctor?

A. Yes, sir.

Q. What is the cause of that disease?

A. Usually—what is the usual cause?

Q. Yes.

A. Well, it may arise from several causes. More often, the first thing we naturally look for in valvular disease of the heart is to inquire if the man has had rheumatism. It is peculiar in acute rheumatism especially, for the peculiar poison that causes the rheumatism takes effect on the valves of the heart and causes disease. Of course, it might occur in the heart trouble t*wo*. The very first symptom of rheumatism is without rheumatism having preceded it.

Q. Rheumatism is not the only cause?

A. Not the only cause; no.

126 Q. Doesn't valvular lesion take place from sudden shocks to the system?

A. Yes; but I think there would have to be an imperfect condition of the system. It would have to be a fearful shock that would cause lesion itself, unless there was an abnormal condition of the system.

Q. Suppose the person had some little tendency to organic disease of the heart, wouldn't valvular lesion occur by a sudden shock at that time?

A. Well, valvular lesion is almost always—it is a common form of organic disease of the heart. There is another fact (interrupted)——

Q. Wouldn't that be apt to occur under those circumstances?

A. In relation to what?

Q. Suppose, for instance, that he had organic disease of the heart, but it was not developed sufficiently for the person to know it; that it is not apparent; not any symptom that that is the case, isn't that a fact sometimes, that a person has organic disease of the heart and he would not ordinarily di*d*cover it?

A. You might have it without knowing it.

Q. *Q.* And if someb*u*dy should come up behind him with a club and knock him senseless wouldn't that be apt to aggravate that disease?

A. Yes, sir; it would be very likely to.

Q. Suppose a person, for instance, to be about 45 years of age, strong and healthy—in fact, a hard-working man, doing his regular day's work; a man who has gone through the exciting scenes of the war, and nothing like that, or if he never discovered anything the matter with his heart—suppose it is a man in the full tide of life and strength, and he should be suddenly knocked senseless from a blow from an iron wheel weighing fifty or sixty pounds and he had had at that time organic disease of the heart or disease of the heart in such a state that he had never noticed it, wouldn't that be very apt to aggravate and make the symptoms more pronounced?

A. I think there is no question of that. With organic disease a shock or excitement or anything of that kind is likely to aggravate it.

Q. Don't you think that it is possible that under such circumstances a shock of that kind might cause valvular lesion and bring on organic disease of the heart?

A. I hardly think so.

Q. Still it would be possible?

A. I can hardly imagine a case of that kind.

Q. Haven't you read of such cases where a fall was the cause of organic disease of the heart and to be the fountain head of the disease?

A. Of course such a thing might be possible, but I can hardly imagine such a case, unless it was such a severe injury—to injure the valves of the heart it would have to be such a severe injury that it would almost cause death.

Q. You don't think valvular lesion could occur from a fall or sudden shock of that kind?

A. I hardly think so, unless there was a tendency to it in the first place.

Q. There might be that tendency, and that might exist all through life and never develop except upon some such shock. Isn't that the fact?

127 *Q.* It is hardly likely that any tendency would exist during life. It might for several years; it might for a number of years.

Q. People live to a good old age with organic disease of the heart that they have had ever since they reached the years of maturity. Isn't that the case?

A. Yes; that is so.

Q. And if they are not subjected to any sudden shock or strong excitement, why it might never cause them any especial trouble?

A. They might live along for twenty years or more.

Q. Men may go about their work and work right along and never know they have got heart disease unless some sudden shock develops it?

A. Many might not know it themselves, but still they would find that they would have to be a little more careful.

Q. As they grow older?

A. Yes, sir.

Q. But still a man 45 years of age—a strong healthy man—he would not be apt to notice it unless the symptoms were pretty pronounced?

A. He wouldn't be as strong as a man would without the trouble.

Q. Still, if he was strong and active and performed his work regularly, it would be impossible for him to have that tendency without its being especially developed?

A. Even a man with fair strength. Sometimes you may not discover the murmur, but there may be commencing valvular trouble and he do ordinary work, fair work, and not know he had trouble for years, and not be able to discover serious trouble commencing.

Q. What kind of a murmur do you call this that you heard there, Doctor?

A. A mitral regurgitant murmur.

Q. Where is that the loudest?

A. A little loudest at the apex of the heart.

Q. And in what direction does it extend?

A. Well, we generally hear it—that is, we place the stethescope over the line toward the apex, where it generally increases in intensity.

Q. Can you hear it at the lower end of the scapula?

A. Yes; you might hear it (interrupted)——

Q. Did you examine the carotids?

A. I did.

Q. Was there this (interrupted)——

A. It was so plain a case of murmur that I did not examine, but you can generally detect it at the point of the scapula.

Q. You didn't examine it? Did you examine the carotids?

A. I did.

Q. Was it propagated to the carotids?

A. No, sir.

Q. In what position was Mr. Hawthorne when you made this examination?

A. In a sitting position.

Q. Did you examine him when he was lying down?

A. There was no occasion——

Q. Isn't it sometimes necessary?

A. You could discover mitral murmur in any position.

Q. So it is not necessary. Suppose that upon an examination lying down you had not discovered it, what would be your conclusion?

A. Such a thing is not possible?

128 Q. It is not possible? Did you ever examine to find out?

A. No; I never did examine in that case, but from all my cases that I ever had you will find it in all positions; and then in this case I didn't put him on his back because I had never seen him but just once, and I am certain that it is not possible for an organic (interrupted)——

Q. Yes; supposing it to be an organic murmur.

A. Yes.

Q. Now, upon what do you base your conclusion that there was organic murmur or, as you say, a mitral regurgitating murmur?

A. If I was going to search for an inorganic murmur—in the first place, I would never find an inorganic murmur—an anæmic murmur—except at the base of the heart, and that would be transmitted up by by the vessels, so at the very place you would expect to find this anæmic or inorganic murmur you don't find it.

Q. You were looking for an organic murmur, weren't you?

A. I was also looking for an inorganic murmur, because I examined all about the base of the heart to see if it was possible that there was any inorganic murmur connected with it.

Q. Suppose there was an inorganic murmur not indicating organic disease of the heart, what would be your conclusion; would you have laid the patient down and examined him then?

A. I don't think it would have any effect.

Q. Did you try to find an inorganic murmur?

A. Yes; I don't think it would have any effect. I am speaking of the organic.

A. The inorganic I am talking about; whether a man was lying down or sitting up, would that make any difference?

A. I don't think the circulation of the blood—of course the heart beats just as powerfully, perhaps not quite so rapidly, when the man lies down, but it is beating, and you might hear the murmur not quite so distinctly as you would when the man was sitting up; that is true.

Q. Suppose it to be a fact that when the patient was lying down you found this murmur could not be distinguished, wouldn't that tend to show that it was inorganic murmur?

A. If the murmur, the anæmic murmur, was so very difficult to distinguish—I think I could form in my mind such a case that when the anæmic murmur might be so difficult to discover that when the man was lying down, the heart being a little more quiet, maybe I would not discover it; but still that would be so slight that I would hardly notice a difference.

Q. Still that is one of the evidences of the inorganic murmur—the anæmic murmur, as you call it—that it is not quite so loud when the patient is lying down as when sitting up?

A. It is not an evidence that is usually referred to by our authorities or that physicians usually entertain.

Q. It is a fact, though, isn't it?

A. It would be; I think I can consider such a case as that, but I don't recollect such a case in my mind. I think I can see that in such a case—a man lying down—his heart would beat milder, but I feel it pretty certain that it would be possible *possible* to hear it still; that it would not disappear. I am certain of that.

Q. The only difference, as I understand you, between the organic and inorganic murmur is the location?

A. Not at all.

129 Q. What else is there?

A. The organic refers to disease (interrupted)——

Q. I know; but, in regard to ascertaining which it is, *it* there anything but location of the murmurs that operates as a distinguishing mark between them?

A. Well, always—I think it would be so almost always—you find the patient must have a very anæmic condition to produce anæmic murmur. There must be a condition of the blood, a watery condition, so to speak, to produce that blowing or singular sound that we do not find in the organic murmur; and that is generally found at the base of the heart and is transmitted up to the carotids, so much so that it is almost considered as a fact that when you don't find it there that you hav-n't gor anæmic murmur to deal with.

Q. There is no difference in the murmurs so far as the loudness of sound is concerned?

A. There would be a little difference. Anæmic murmur would be softer and more of a blowing murmur, sometimes not so harsh. Of course with organic murmurs there is difference in sound.

Q. Does mitral murmur necessarily indicate organic disease of the heart?

A. A mitral murmur?

Q. Yes, sir.

A. Yes.

Q. Always does?

A. I think it always does.

Q. Suppose it began with the first sound of the heart and is limited to a circumscribed area around the apex of the heart, does that always indicate or*f*anic disease of the heart?

A. What is that?

Q. Suppose it began with the first sound of the heart and is limited to a circumscribed area around the apex of the heart, does that indicate organic disease?

A. I think I should say that was organic disease.

Q. Does it always indicate or denote mitral regurgitation?

A. When you find it at the apex?

Q. Yes, sir; mitral murmur begins with the first sound of the heart and you find it at the apex of the heart. Does that always denote mitral regurgitation?

A. I think so; I think so; in my opinion.

Q. Are you acquainted with a work written by Flint, a physical diagnosis of diseases affecting the lungs and heart?

A. I have read it; yes.

Q. Is that considered good authority?

A. It is. It is a fair authority. It was in its day. It is not so good now as perhaps Loomis or some others; but still it is considered fair authority.

Q. Its date—how long ago was that?

A. Well, we hav-n't had a late *addition* of the work. That authority is fair.

Q. Is it good authority on that subject?

A. It is considered good authority on that subject.

Q. Suppose you should find in that work (reads): "The mitral murmur, beginning with the first sound of the heart and limited to a circumscribed space at the apex, d*u*es not always denote mitral regurgitation," would you say that Flint was right?

A. I was going to tell you this: There may be organic trouble at
the aortic valve that might also cause a murmur at this point
130 that you speak of. It sometimes causes murmur at the apex.
Q. Would you still adhere to the opinion you expressed?

A. That would be an organic disease.

Q. It would be?

A. Yes, if it was found at the aorta.

Q. Didn't you state that that would also denote mitral regurgitation, the mitral murmur beginning with the first sound of the heart?

A. I think there would be some regurgitation. It would denote this, that there was certainly mitral disease.

Q. And the presence of mitral regurgitation?

A. Mitral regurgitation is where there is a diminished flow of the blood; the valves are not able to close properly as the ventricles close, and of course it is forced back into the auricles when they ought to be closed.

Q. Is that organic disease of the heart?

A. Yes; that is organic disease of the heart generally; but here you may have a murmur where I think there would not be regurgitation, where the organic trouble was in the aortic valve.

Q. Didn't you testify that this mitral murmur would always denote (interrupted)——

A. I should qualify it with this exception (interrupted)——

Q. What would you call such a murmur as that?

A. I would hardly know how to explain it except through the singularity of action throwing the heart into a tremulous action that would give rise to a murmur there. I wouldn't say positively that that was regurgitation. I know there is a singular condition of disease of that valve that sometimes produces murmur at the mitral, where it would be discovered if there was regurgitation and yest that Flint thinks is different; but still there must be disease of the aortic valve to cause it.

Q. Did you ever hear of a mitral systolic murmur?

A. Yes.

Q. What is that?

A. Well, that would be the same thing as this mitral regurgitant.

Q. The same thing? Did you ever hear of an intraventricular murmur?

A. Intraventricular?

Q. Yes, sir.

A. Many of those terms I never use. We generally speak of them as referring to the valves. There are many terms that we use in student life that in practitioners' life often pass out of our minds.

Q. Do you know the difference between an intraventricular murmur and a mitral systolic murmur?

A. Yes.

Q. What is it?

A. There is a slight space of time between the ventricular contraction and that of the auricle (interrupted)——

Q. Do you know the difference between those two murmurs, Doctor? That's what I want to get at.

A. I don't know as I would know just what you mean by an intraventricular murmur.

Q. Hasn't that term a definite signification in surgery?

A. It is not a term that is often used.

Q. You don't know what it means, Doctor, then?

A. Auricular and ventricular murmurs are uncommon names as applied to the valves themselves.

Q. Do you know what the term means?

A. Intra would certainly mean between or within, and ventricular (interrupted)——

Q. What does it mean, what does it mean, Doctor? Do you know?

131 A. It means within the ventricles.

Q. Just state so that we can get along as rapidly as possible.

A. I know it means within the ventricles.

Q. It is a murmur within the ventricles?

A. It is a murmur within the ventricles.

Q. Is that all the definition you can give?

A. That is what the word must mean.

Q. The mitral systolic murmur, what is that?

A. It occurs with the contractions of the ventricles, or is a regurgitant murmur.

Q. It is different from the intraventricular murmur?

A. I might call a mitral systolic murmur an intraventricular murmur.

Q. Would you be correct if you did?

A. I don't use the term.

Q. You don't know whether it would be correct to call it that or not?

A. I don't use the term. I generally use terms that are in common use. Some might call it that.

Q. I want to know if you would be correct if you did?

A. I don't use the term.

Q. And you don't understand the term. I want to know if you would be correct if you called it that?

A. I would not use that term at all, Mr. Haines.

Q. You would use it if you understood the term.

A. I seldom use the term.

Q. Now, Doctor, do you say that you didn't carefully notice the wounds on the head of Mr. Hawthorne?

A. Yes.

Q. Why not?

A. Because my impression was that I was to examine the heart—particularly the heart. That is what I was asked to examine.

Q. You went there to examine heart disease?

A. That was my object. Still I might have investigated any other troubles (interrupted)——

Q. At whose instance did you go there?

A. At Mr. McNaught's.

Q. You went there to examine the heart; not to ascertain what was the matter with the man generally, but simply to examine the heart?

A. Well, I took the trouble to ask several questions, but not so minutely as I did in reference to the heart.

Q. You are not prepared to say, as I understand you, Doctor, that all the difficulties that Mr. Hawthorne seems to be suffering from physically arise from heart trouble?

A. I am not going to say anything of the kind.

Q. Now, you take that matter of dizziness, does that necessarily arise from heart disease?

A. Dizziness necessarily arise?

Q. Yes.

A. There may be other causes for it, but then it will almost always arise from heart disease.

Q. There are a great many causes of dizziness, ain't there?

A. Yes, sir.

Q. Suppose a person suffered a blow upon the head and the outer table of the skul- was fractured and the inner table was depressed, would dizziness be apt to follow?

A. Very likely; yes, sir.

Q. And be apt to continue for a definite period?

A. Very likely. If there was depression, it would be very likely to.

132 Q. If there was any depression that dizziness would be apt to be permanent, wouldn't it?

A. Yes.

Q. Recurring from time to time?

A. Yes; I think so.

Q. It would be very apt to incapacitate a person from doing work or doing anything in the way of labor?

A. It would depend on the extent of the depression, of course.

Q. You say that organic disease of the heart produces organic diseases of the brain?

A. Sometimes.

Q. How?

A. Well, the most common way would be a deposit on the valve of the heart, stopping and plugging up the vessel and shutting off the circulation of the brain, and that produces paralysis or many other of the brain troubles, just as we get it from an effusion of blood upon the brain.

Q. An effusion of blood on the brain is apt to produce paralysis, is it?

A. Yes, sir.

Q. And wouldn't that follow a blow upon the head which resulted in a fracture of the outer table and a depression of the inner table?

A. It often does.

Q. Paralysis often follows injuries of that kind?

A. Yes, sir.

Q. Persistent pain in the head is a very common symptom showing injuries resulting from a fracture of the skull, isn't it, Doctor?

A. Yes, sir.

Q. And where the inner table is depressed and the outer table fractured the pain in the head is liable to continue through life, isn't it?

A. Yes; I think it very likely would. Of course, it is not certain, because sometimes there may be considerable depression and that not continue a great while.

Q. Undoubtedly. Of course in some cases, but in others it might continue during life. In a severe fracture that would be very likely to be there?

A. In others very likely.

Q. A considerable depression of the inner table?

A. Yes, sir.

Q. Do you testify that you don't think that, or do you testify (interrupted)——

A. I am not positively.

Q. And you don't think that Mr. Hawthorne's condition up there as you found him resulted from the blow on the head—that is, this disease of the heart?

A. No; I don't think that the disease of the heart resulted from a blow on the head. I cannot see any connection between the blow and the trouble of the heart. I can see connection between trouble of the heart and the trouble of the head, but not between the blow upon the head and the trouble of the heart, unless there was some organic disease that this blow increased or made worse.

Q. Isn't it a matter very difficult to ascertain how organic disease of the heart originates?

A. Yes; I think that's true.

Q. It is impossible to make an examination of the heart in its incipient stages of the heart disease and ascertain that fact?

A. I think there may be commencing troubles of the heart that are incipient or that are valvular troubles that we will not be able to diagnose just at the time.

133 Q. It is not known to the patient for some time?

A. Yes.

Q. But up to that time it is very difficult to trace it?

A. In many cases unless there is enlargement of the heart, considerable enlargement of the heart; but that is possible before valvular disease, and that may be.

Q. What is the first symptom of organic disease of the heart that physicians can notice?

A. The first symptom?

Q. Yes.

A. It is hard to say what would be the first symptom.

Q. Isn't the murmur the first symptom?

A. Sometimes it would be an enlargement of the heart that would be noticed and then paralysis.

Q. Isn't shortness of breath one of the symptoms?

A. Shortness of breath is one of the first symptoms, but sometimes it don't come until the enlargement of the heart, in the second stage of the heart trouble.

Q. You say that you don't see any connection between the disease of the heart and the disease of the brain, but you can see a connection between a sudden shock and the disease of the heart, can't you, Doctor?

A. Where there is heart trouble I can see a connection between a blow or serious injury making that worse.

Q. Where it is latent?

A. Yes; where there is trouble, but where a man is in a natural state of health I can hardly imagine how an ordinary injury would cause it.

Q. You spoke of enlargement of the heart. Is that always coincident of valvular trouble or evidence of valvular trouble?

A. Yes; but there may be enlargement of the heart without valvular trouble, but there is not likely to be valvular trouble without enlargement.

Q. Did you find enlargement of the heart in this case?

A. I think there was some little enlargement.

Q. Did you think Mr. Hawthorne was weaker in one hand than in the other?

A. So I thought. I thought so.

Q. Did you notice which hand it was?

A. It was his right hand.

Q. That would indicate paralysis, would it—partial?

A. Yes; it would indicate paralysis.

Q. Paralysis is a common result of injuries to the brain, isn't it?

A. Yes. Of course, there might be a local cause right there in the arm itself that I could not see.

Q. That would probably be an injury that the arm had received, wouldn't it?

A. Yes; it might be.

Q. Doesn't paralysis follow injuries of the brain, even injuries to any other part of the body—the brain or the spinal column?

A. Yes.

Q. Does it follow heart disease?

A. Paralysis follow heart disease?

Q. Yes.

A. Yes; it does when the embolia obstructed the circulation, depending on the size, of course. It might be so small as to cause a very slight obstruction of the circulation, and, of course, the paralysis would be small; but often it is quite liable to increase, and then there might be paralysis, depending on the character of the vessel that was obstructed.

134 Q. Did you notice any evidence of injury to Mr. Hawthorne's nervous system? Did you notice what his condition was in that respect?

A. Well, he certainly seemed to be very nervous, but I didn't examine him enough. I wouldn't like to be examined too closely on his nervous system, because I didn't take time to give him an honest examination.

Q. Does a depression and a weakened condition of the nervous system usually follow injuries to the brain received by a blow on the head?

A. Don't a weakened condition of the nervous system usually follow?

Q. Yes.

A. Yes; it does.

Q. That would be one of the evidences of such an injury, would it not?

A. Yes.

Q. Paralysis would be another?

A. Yes; it would.

Q. You say you saw no evidence of his suffering from anything of this kind? What do you mean by that, Doctor?

A. Did I make such a statement?

A. Perhaps I misunderstood you.

A. I know he appeared to be sensitive. Of course, you have got to judge from his own expressions.

Q. Wouldn't that generally follow, Doctor, sensitiveness where there had been a fracture of the outer table of the skull and depression of the inner table, and inflammation of some kind resulted from it?

A. There might be sensitiveness, and yest at the same time there might be a serious fracture, quite an extensive fracture, and not a great deal of suffering.

Q. Suppose a man was in that condition and was wounded at the point where this wound was, and that it produced geat pain, blinding pain, what would be your conclusion as regards the condition of the brain?

A. Well, if I was certain that the man was honest in expressing that, that pressing upon the brain caused dizziness, I would think there must be an accumulation of blood between the parts that was pressing on some portion of the brain. Either a fracture (interrupted)——

Q. That would indicate a local injury.

A. That would indicate a local injury communicating (interrupted)——

Q. That very sensitiveness would indicate that, would it not?

A. Yes.

Q. Dr. Weed was there and Dr. Kreigk and Dr. Miller at the time of the examination?

A Yes.

Q. And participated in the examination?

A. I made my own examination. I made no remarks about it. I made my examination and the others made theirs. We had no remarks to make about our examinations.

Q. Who did you go there with?

A. I went there alone. Dr. Weed was there.

Q. You understand that you and Dr. Weed was there at the instance of the defendant?

A. Yes, sir.

Q. But you now understand that Dr. Miller was there as the attending physician of Mr. Hawthorne?

A. I don't know whether I knew that or not. I knew he was interested on that side of the case.

Q. And you were interested on the other?

Mr. HAINES: That is all.

135 Redirect examination by Mr. McNAUGHT:

Q. It is very probable that a physician could have attended Mr. Hawthorne for the year last past and treated him generally without knowing that he had organic disease of the heart?

A. Not if he had examined him. I don't think it is possible.

Q. In making the examination, Doctor, what instrument, if any, did you use.

A. A stethescope. I sometimes use my ear. In this case I used a stethescope—just as necessary.

Recross-examination by Mr. HAINES:

Q. Suppose the physician, when he attended him, made an examination of the patient and ascertained that, on his lying down this murmur ceased, don't you think that he would be justified in coming to the conclusion that he did not have organic disease of the heart?

A. I don't think it possible in this case or reasonable to suppose that was the case.

Q. I know; but suppose you went there and found that to be the case, don't you think that would be a very natural conclusion, if it was a fact? I am assuming that it was a fact.

A. If it was really a fact, why it would be. It might be possible that there was no organic disease of the heart, but such a thing is not possible in such a case as that.

Q. You are not arguing that matter. I am assuming that to be a fact. If the physician found that to be the case, you would not consider that it was very much out of the way in concluding that it was not organic disease of the heart?

A. If I found that to be the case, that there was no murmur there, I think there would be very fair ground for assuming that there was not an organic disease of the heart, if he understood himself.

Dr. G. A. Weed called as a witness for the defendant and sworn.

(By Mr. McNaught:)

Q. What is your profession, Dr. Weed?

A. Physician and surgeon.

Q. How long have you been a practicing physician and surgeon.

A. Almost 30 years.

Q. What college or school are you a graduate of?

A. The regular school of medicine.

Q. What experience, Doctor, have you had in the treatment of heart disease?

A. Considerable.

Q. Covering what period of years?

A. Most of that time—all of that time, I may say.

Q. Have you ever examined the plaintiff in this case, Mr. Hawthorne?

A. Yes, sir.

Q. When did you make the examination?

A. I think about 10 o'clock to-day.

Q. Did you use an instrument in your examination?

A. Yes; a stethescope, and my ear, if that may be considered an instrument.

Q. What organic disease, if any, did you find the plaintiff, Mr. Hawthorne, suffering under?

136 A. He has organic disease of the left mitral valves.

Q. Was the disease of such a character that the murmur was readily distinguishable?

A. Yes, sir.

Q. How does this case compare as being a marked case readily distinguishable from the cases that you have come in contact with?

A. It is a very clear case, in my mind.

Q. A very clear case?

A. Yes, sir.

Q. Is there any necessary connection between the organic heart disease and the injury that Mr. Hawthorne received on the head?

A. I think not, sir.

Q. Did you examine the wound on the head?

A. Very slightly. The part seemed to be very sensitive. Mrs. Hawthorne objected somewhat to having him examined. She said it disturbed him very much. The examination was very limited.

Q. So far as the head was concerned?

A. Yes. There is the evidence of an old scar there. I think I saw that, or the scar at least.

Q. Does organic disease of the heart ever produce organic disease of the brain?

A. It may, secondarily.

Q. Did you find in Mr. Hawthorne any evidence of paralysis?

A. Well, I could not say that I did. And I want to say here that an examination of such a case for the purpose of ascertaining the true condition of his nervous system requires more time than I had to give it to-day. Such a case, I think, needs careful watching and observation to determine the nature of the disease resulting from the injury, if it did so result.

Q. Does it require any more time than you took to ascertain that he had organic disease of the heart?

A. Well, that is a matter that is clear and palpable. Nervous diseases, of course, are more obscure.

Q. Did you notice any difference in either hand as to whether one was weaker than the other or the grasp stronger in one than the other?

A. I did not examine him in that particular. Dr. Willard did.

Q. Did you notice any indications of trouble which were not ordinarily attributable to organic disease of the heart?

A. His condition while on his feet seemed unsteady. That is the only indication I saw of paralysis.

Q. How soon, ordinarily, if there is a fracture of the outer table of the skull, so as to cause depression of the inner table, would paralysis ordinarily set in?

A. It would be immediate.

Q. Immediate?

A. If there was any considerable depression.

Q. Ordinarily, Doctor, wouldn't a physician attending Mr. Hawthorne during the last year, prescribing for him generally, ascertain that he had organic disease of the heart?

A. Well, the presumption is he would if he had attended to him closely or carefully. It is true he might not if the disease had been in its incipient state.

Q. How serious is the disease in this case?

A. The disease is pretty well advanced here, so it is very marked, in my judgment.

137 Q. Was the murmur of such a character that it is readily distinguishable with the ear without the use of the instrument?

A. Yes, sir.

Cross-examination by Mr. HAINES:

Q. At whose instance did you make this examination?

A. At whose instance?

Q. Yes.

A. Mr. McNaught's.

Q. Was there any objectian made by Mrs. Hawthorne or any one there to your examining Mr. Hawthorne?

A. They thought that Dr. Miller and the physicians that had testified in this case ought to be present. That was entirely satisfactory to me, and I sent a messenger over and telephoned down.

Q. Doctor, you understood that Dr. Miller was Mr. Hawthorne's attending physician?

A. I never knew a thing about it.

Q. You understood that to be the fact about it?

A. I learnt it after I got there.

Q. Did you not understand that that was the reason why the family desired to have Dr. Miller present?

The COURT: The witness stated that was the reason.

Mr. HAINES: Mr. Hawthorne stated that when he went there.

Q. And no obstacle was thrown in your way in conducting the examination thoroughly?

A. No, sir.

Q. How thoroughly was the examination made?

A. Beg pardon?

Q. How thorough was it?

A. Well, so far as the examination of the chest was concerned, I made a thorough examination. So far as his general condition was concerned, it was not a very thorough examination. That was made upon my part for the reason I stated here before, that I didn't think there was sufficient time to form an opinion that I would be perfectly willing to stand by.

Q. You didn't *soc*sider that examination to be sufficiently thorough to give you any well-defined idea in regard to the man's actual condition, did you, Doctor?

A. So far as his heart and chest is concerned, I think I have a very good idea about it.

Q. But in any other respects you could not say that you have?

A. I could not say that I have an opinion that is entirely satisfactory to me.

Q. In what condition did you find his nervous system?

A. He seemed to be somewhat shattered in his nervous system.

Q. Did you have him put out his tongue?

A. Yes, sir.

Q. Did you notice anything peculiar about that?

A. He put his tongue out twice, and there was a slight deviation to the left as he put out his tongue.

Q. What would that indicate?

A. Well, if it was a true condition and symptom, it would indicate some paralysis.

Q. On which side?

A. Well, it may be on either side, although ordinarily injuries on one side of the brain produce evidence of paralysis on the other side of the body.

Q. Where the injury is at or near the middle, then the paralysis is liable to be on either side, isn't it, Doctor?

A. I think so.

138 Q. Did you state to Mr. McNaught that there was no evidence of paralysis.

A. Well, yes; I stated that in general terms, and this is the only evidence that I saw about the tongue, but that didn't occur to me at the time. That is the only evidence that I saw in the case.

Q. Don't you regard his unsteadiness on his feet as evidence of paralysis?

A. Not necessarily. You may have that without paralysis.

Q. What other cause would you attribute it to?

A. A shattered condition of the nervous system and extreme prostration.

Q. And what would produce a shattered condition of the nervous system?

A. Various causes.

Q. Suppose he had received a year ago last October a blow on the head at the place where you saw this scar from an iron wheel weighing from forty to fifty pounds, falling a distance of eight or nine feet, fracturing the outer table of the skull and depressing the inner table, to what would you attribute the shattered condition of his nervous system?

A. It may come from that cause.

Q. It is quite common that such things should happen?

A. Severe blows on the head produce that.

Q. Isn't that very apt to be the result?

A. Yes, sir; I think it is.

Q. Now, in regard to the condition of the heart, you say there is no necessary connection between the wound on the head and the disease of the heart. You don't mean to say by that that there is no possible connection?

A. No; I didn't say there was no possible connection, because that would be a statement difficult to prove.

Q. Organic disease of the heart is sometimes and very often aggravated, is it not, by a sudden blow or shock or fall?

A. Yes, sir.

Q. Isn't valvular lesion of the heart sometimes occasioned by a fall?

A. It may be, but I think in cases where lesion of that kind occurs from a fall the injury would in nine cases out of ten be such as to destroy life. It must be a very severe fall, indeed, to produce that form of lesion.

Q. It might produce some lesion, might it not, and that afterwards grow?

A. I have admitted that it is possible, but it is highly improbable.

Q. When, however, the person had organic disease of the heart, and it was latent and not discoverable to ordinary men, and didn't manifest itself in any symptoms upon the health of the patient, then a sudden shock might aggravate it and cause the progress of the disease to become much more rapid, may it not, Doctor.

A. Yes; it is possible.

Q. Well, isn't that very often the case?

A. Yes; where a man has incipient organic disease of the heart, or at any stage, one of the cardinal rules of treatment is to keep him as quiet and free from excitement as possible.

Q. Isn't it quite possible and nothing extraordinary that a person
should go through life with organic disease of the heart, and
139 that never be developed to an extent to occasion them any
inconvenience except they receive a sudden shock such as I
have mentioned—isn't that quite possible?

A. It is true persons may go through life with organic disease of the heart and live the usual age. Such cases I don't know that they would be any more liable to injury from sudden shock than others. That is one of those cases of heart disease where the lesion becomes stationary and the health goes on about so.

Q. But in such cases a sudden blow or shock or violent excitement would be very apt, would it not, to aggravate the disease?

A. Violent excitement would be. Anything that checks or would impair the vitality or disturb the nervous system would be liable to produce functional disease of the heart.

Q. If a man should be knocked down suddenly in the way I have mentioned with heart disease that would have some such effect?

A. It would be very apt to produce excitement of the heart and increased circulation, but not likely to produce valvular lesion.

Q. You don't think a shock of that kind would produce valvular lesion even if the person had at that time organic disease of the heart in its earliest stages?

A. It is possible, but I don't think it probable.

Q. Hav-n't you heard of cases where persons have dropped dead from heart disease under violent excitement when the existence of the disease had never been suspected up to that time?

A. That may be; yes, sir.

Q. Now, what causes that?

A. Well, heart disease goes on very gradually and the valvular trouble increases without much pain, and some sudden excitement produces such agitation of the heart that either fainting or some condition supervenes and the person dies on the spot.

Q. And a less excitement would not produce death, but would aggravate the trouble, wouldn't it?

A. Yes, sir.

Q. So that death might occur in two or three tears afterwards? Isn't that the case sometimes?

A. Oh, it is possible that may be the case.

Q. Well, don't you know cases of that kind? Hav-n't you read of them and aren't they reported?

A. I have no doubt that excitement of that kind might aggravate a case of disease of the heart—excitement of any kind.

Q. And if you should find a case where a man had lived to the age of 45 years apparently in perfect health, a man that never had a particle of trouble or anything to indicate the presence of heart disease, should suddenly receive an injury such as I have mentioned, resulting in the fracture of the skull, and from that time he manifested heart disease, culminating at a period of, say, 15 *of* 16 months in the condition in which you found Mr. Hawthorne, wouldn't you be very apt to conclude that that blow had something to do with aggravating the disease?

A. I shouldn't naturally come to that conclusion, because I don't see the connection between the two. I say such a thing might occur, but the exception would prove the rule, I should think, in a case of that kind.

140 Q. How would you account for the fact that the man had enjoyed such perfect health and strength down to the time of receiving the injury, and from that time he had been a hopeless invalid and a physical wreck?

A. Well, of course, that may have come from the blow he received, and it may not. I am not prepared to say.

Q. You would regard the chances as about even, wouldn't you, each way?

A. Well, I think what the matter is with the man is heart disease, and it is simply a question as to how largely that affects his health and accounts for his present condition.

Q. You and I don't exactly agree on the issues before the jury in that respect. I am asking you that question. Supposing those to be the *g*acts, if you wouldn't regard it as quite likely that the violent blow had something to do with the aggravation and progress of that difficulty with the heart.

A. I think I would have to say *o*t was possible.

Q. And not at all improbable?

A. In an indirect way, that I will explain, by the excitement, not by the blow, creating the lesion at all.

Q. I am not getting at the particular detail at all. But, as a matter of fact, it would not be at all, if such was the case, under those circumstances, Doctor?

A. I think it is possible.

Q. And not at all improbable?

A. Well, I think it is improbable.

Q. You think it is improbable? How would you account for it?

A. I have no other theory except that.

Q. How would you account for it; for the heart disease; for the fact that that man up to the hour and minute that he received that blow was apparently perfectly healthy, and has been an invalid ever since, and that sickness has resulted in the condition in which you found Mr. Hawthorne? How would you account for it on any other theory?

A. He may have had heart disease before he received that blow. It may have come on since. I cannot say.

Q. What would be your theory of accounting for that except upon this?

A. Not knowing the history of the case, it is difficult to tell, without a more careful observation, how much is due to the organic disease of the heart and how much may have come from the injury he received in the head.

Q. It would be difficult to tell?

A. Yes, sir.

Q. What did you say—that you would consider it improbable that his present condition resulted in great measure from the blow on the head; you said that you thought it would be improbable?

A. I say it is possible.

Q. Quite possible?

A. I said, in the first place, that my examination had not been such as to give an *iponion* that I would be able to stand by in regard to that matter.

Q. What medical term would you apply to this murmur that you found?

A. Well, it is a mitral regurgitant murmur.

Q. Does it always indicate organic disease of the heart?

A. Practically, I think it does, beyond a question.

Q. With what sound of the heart does this murmur begin?

A. The mitral sound. It begins with the systolic beat of the heart.

141 Q. With what?

A. With the systolic.

Q. Do you know wha*tt* the mitral systolic *p*urmur is?

A. The mitral systolic?

Q. Yes.

A. It is a murmur that is coincident with the contraction of the heart.

Q. And does that indicate mitral regurgitation?

A. I think it does.

Q. Always?

A. Yes, sir.

Q. How about the intraventricular murmur? Does that indicate mitral regurgitation?

A. I want to say right here I am not familiar with the term. A good many technical terms have come into use recently, but I presume the term applies to a normal sound of the heart, where there is no abnormal one connected with the valvular condition.

Q. But you think that the mitral murmur always indicates mitral regurgitation; that would be your judgment?

A. Practically, I think that is without an exception.

Q. It is upon that theory that you base your conclusion that the mitral murmur which you discovered in Mr. Hawthorne denotes organic disease of the heart?

A. Yes, sir.

Q. And if you are mistaken as to that, then you are possibly mistaken as to your diagnosis of the case, aren't you, Doctor?

A. A mistake is a mistake, of course.

Q. Certainly.

A. Certainly.

Q. You didn't lay Mr. Hawthorne down?

A. No; I did not.

Q. You didn't consider it necessary?

A. No; I did not.

Q. If on laying him down you had failed to discover that murmur of the heart would you have changed your opinion as regards his having organic disease of the heart?

A. If I examined him sitting up, as I did, and then examined him lying down I should expect to find the murmur.

Q. If you didn't find it, what then?

A. I am satisfied that every organic murmur of the heart valvular lesion can be heard both lying down and standing up.

Q. How about an inorganic lesion?

A. An ordinary anæmic murmur that comes from an impoverished condition of the blood, it would be probably less pronounced lying down than standing.

Q. That would be one of the evidences of the fact, if it were a fact, that the murmur was an inorganic murmur if it was less loud when he was lying down than it was when he was sitting up?

A. I don't think that it would amount to much, for the reason that when the patient is lying down the heart is a little further away from the walls of the chest, and none of the sounds of the heart are quite so distinct.

Q. If it ceased it would be pretty strong evidence that it was an anæmic murmur instead of one that indicated organic disease of the heart?

A. I don't think it would cease in either case.

Q. I know. But if it did, wouldn't it, Doctor?

A. Well, I don't know whether it did or not.

Q. I don't either, but I am supposing the case. If that was the case it would be pretty strong evidence that he did not have organic disease of the heart?

A. My absolute conviction is that the murmur of the heart will be heard in both positions.

142 Q. Let me put that in a little different form. You say that the organic murmur of the heart, or this murmur that indicated mitral regurgitation, is heard when the patient is sitting up and when he is lying down?

A. Yes.

Q. Now, suppose you found the murmur there is not heard when the patient is lying down, you would say that it did not indicate mitral regurgitation, and was an inorganic murmur?

A. I should say, as I said before, that the anæmic murmur probably would be louder sitting up than lying down; but I should not expect to find it exhausted in a recumbent position.

Q. If you didn't find it, what conclusion would you come to?

A. I would make a fuller examination.

Q. Suppose, on a fuller examination, there was none there?

A. I would satisfy myself thoroughly.

Q. Suppose you satisfied yourself thoroughly that there was no murmur when he was lying down?

A. I should consider that it was a very exceptional case, requiring (interrupted)——

Q. You would give it up?

A. I would not give it up; I think those things are consistent.

Q. If you found that you would think you had struck something that you had never heard before?

A. I might make up my mind that I had struck a peculiar case, and go on and investigate.

Q. You wouldn't know what it was?

A. I would know something about it, and go on and investigate until I came to a conclusion as to what was the matter with the man.

Q. Suppose that was all you knew about it?

A. I would conclude he had heart disease in some peculiar form.

Q. Even if you could not hear this murmur when he was lying down, when you made it out when he was standing up?

A. Yes; I think I would investigate the case until I found out.

Q. This case, you say, is pretty far advanced?

A. Well, yes; I should say this case was pretty well along. I don't mean to say by that that (interrupted)——

Q. What stage?

A. That the termination of the case is near; but it is so far along as to be very pronounced.

Q. You would call it a hopeless case eventually?

A. Undoubtedly.

Q. You consider that a man situated as he is would never be able to work again?

A. Light work he might do, provided he was well otherwise.

Q. This anæmic murmur often accompanies an impoverished condition of the blood, occasioned by long sickness?

A. Yes.

Q. Does it accompany a shattered — of the nervous system?

A. Not necessarily. My observation is that they are usually met in an extreme low state of the system and an impoverished condition of the blood. Anæmic patients are oftener women than men.

Q. It indicates physical weakness?

A. Yes, sir.

Q. Do you say that you think a physician would ordinarily, if he was attending Mr. Hawthorne—had been attending him for the last fifteen or sixteen months—would have ordinarily *have* discovered the fact that he had organic disease of the heart?

143 A. I don't want to be uncharitable towards any physician in that particular. If he had carefully examined him and the case had been pronounced, as it is now, I think it would have been easy to discover it. It may have been since Dr. Miller has — attending him that it was not so pronounced as it is now.

Q. Suppose that the attending physician on attending him found that when the patient was lying down that this murmur ceased, would you consider then that he was especially at fault in not considering that he had heart disease?

A. Oh, he might make a mistake in a matter.

Q. Don't you think he would be perfectly justified in concluding that he did not have organic disease of the heart if the murmur was not perceptible when he laid down?

A. No; I don't think he would.

Q. You think it would still indicate organic disease of the heart?

A. If there is a distinct murmur that is characteristic of organic disease, that peculiar rasping, roughened sound of the valves that is caused by the thickening or roughening, if it was heard when the patient was sitting up it would certainly be when he was *sitting* down.

Q. I am not discussing that question?

A. That is the kind of a murmur that I heard. I heard no other.

Q. You are criticising the conduct of his attending physician. Now, I desire to ask you, suppose that the attending physician discovered, as a matter of fact, that that murmur was not heard when he was lying down, would you consider, then, that he was at fault in not determining that he had organic disease of the heart?

A. Well, if he heard the murmur, the same murmur I did, he would have heard it when he was lying down.

Q. Is that the only answer you can give to that question?

A. That is the only answer I can give or will give.

Q. I would like very much, inasmuch as you are criticising the conduct of a physician, that you will answer.

The COURT: We will not pursue that any further. The Doctor says that is the only answer he can give.

Q. Did you examine the carotids?

A. Yes, sir.

Q. Did you notice whether the impulse from the heart was communicated to the carotids—the pulse or impulse?

A. Yes, sir.

Q. How about the murmur?

A. There was no murmur in the carotids.

Mr. HAINES: That is all.
Mr. MCNAUGHT: That is all.

Rebuttal.

Dr. P. B. M. MILLER recalled.

(By Mr. HAINES:)

Q. Doctor, you stated your business, I believe. Have you examined the plaintiff in this case, Mr. Hawthorne, at any time since you testified before in this case?

A. I have; twice.

Q. How thorough have been the examinations you have given him?

A. General physical examination.

Q. Were you alone in both instances?

A. No, sir; I was accompanied by Dr. Kreigk on one occasion.

144 Q. Were you present when an examination was made by Drs. Willard and Weed?

A. I was.

Q. How did the thoroughness of their examination compare with the thoroughness of the examination made by you?

—. Well, the examination made by these gentlemen was more particularly directed to the chest. Doctor Willard, however, I think made a more extended examination. He did not confine himself to that alone. He included the chest and the abdomen and the head.

Q. State, Doctor, to the jury the condition in which you found Mr. Hawthorne on the examination made by you—this last examination.

A. In auscultation of the region of the heart I discovered in a standing position a murmur, which had almost the characteristics of a mitral regurgitant murmur; but placing the patient upon his back and examining him there, I found that there was an intraventricular murmur. At least the murmur had disappeared entirely. There was no evidence of a murmur after he was placed upon his back. On lifting him into a sitting position there was again an evidence of a murmur. It was decidedly what I regarded as an intraventricular murmur.

Q. What does that indicate as regards the actual condition of his heart?

A. It indicates that there can't possibly be any organic disease there.

Q. To what cause do you ascribe the presence of this murmur?

A. To a weakened condition of the system; a deterioration of the blood.

Q. And from what does that condition of the system result?

A. Probably from his long continued illness brought on by the injury.

Q. Did you find that the condition of his heart or his symptoms changed from the time you made the last examination before that?

A. No; it revealed the same condition.

Q. And what is your opinion as far as regards Mr. Hawthorne's heart as regards it being sound or not?

A. I am of the opinion that he is suffering from functional disorders of the heart.

Q. What is the cause of that?

A. I attribute it to his general weakened condition.

Q. Did the injury, in your opinion, have anything to do with that present condition of his heart?

A. I assume from the fact that this anæmic murmur exists that it results from the injury indirectly.

Q. The injury bringing about this enfeebled condition of the system?

A. Yes, sir.

Q. Does a mitral murmur necessarily indicate mitral regurgitation?

A. Well, yes, rather; if it is positively made out. But it cannot be made out, because the two sounds are so similar that they can scarcely be made out, with the exception of placing the patient on his back. Then when the sound exists in one it does not exist in the other in that position.

Q. What is meant by an intraventricular murmur?

A. It is a ventricular murmur following the first sound of the heart.

145 Q. Following the first sound?

A. Yes, sir.

Q. Does a mitral murmur follow the first sound of the heart?

A. Yes, sir.

Q. What do you mean by that?

A. It is a systolic sound.

Q. State in regard to the examination that was made there whether any objection was made by Mrs. Hawthorne to the examination of Mr. Hawthorne's head by Drs. Miller and Weed.

A. Nothing more than she has always expressed to myself in relation to the tenderness of his head and touch.

Q. How did you happen to be there, Doctor? What was the occasion of your being there when they went there?

A. Well, I really could not tell you.

Q. Whose instance did you go?

A. At yours.

Q. Did you take any part in the examination?

A. Yes; I examined the carotids.

Q. What did you find in examining the carotids?

A. Absence of any murmur.

Q. Suppose that there was organic disease of the heart, would that be manifested in the carotids?

A. No, sir.

Q. Is there any other place but the heart that you could examine and ascertain whether this mitral murmur actually existed—any other that indicates organic disease of the heart?

A. I don't understand the question.

Q. Is there any other part of the body that you could examine and ascertain whether organic disease of the heart existed?

A. Yes; the impulse is very much larger, sometimes extending to the scapula on the left side, while in this intraventricular murmur it is always limited.

Q. Did you examine Mr. Hawthorne at that place?

A. Yes, sir.

Q. Did you find evidence of organic disease?

A. None.

Q. Did you find any evidence of enlargement of the heart?

A. No, sir; that is a condition I should expect if there was any evidence of valvular trouble?

Q. Suppose, as a matter of fact, Hawthorne had organic disease of the heart and he had been a strong, healthy man up to the date of receiving this injury, to what would you attribute the present condition of the heart, suppose it to be as claimed by Dr. Smith and Dr. Smart and these other physicians? Suppose, as a matter of fact, he did have heart disease, and there had been no symptom of the kind up to the date of the injury, to what would you attribute it? Would you consider that the injury had had anything to do with the disease of the heart in any way?

A. Well, not definitely.

Q. Suppose that the disease had been latent up to that time, what effect would the shock have upon him?

A. I don't think it would have any particular effect.

Q. Did you use any instrument in making the examination?

A. Yes, sir.

Q. What instrument?

A. Stethescope.

Q. Dr. Kreigk was there this morning?

A. Yes, sir.

Q. Did you notice him put out his tongue?

A. I did not.

Q. Did you notice any symptoms or did you learn of any from him at the time these physicians were present, such as a wheel rolling around or some round object in the head?

146 A. No, sir.

Q. Did you notice any evidence of paralysis on this last occasion?

A. Nothing more than subjective symptoms, and those expressed by the patient.

Q. What were they?

A. He complains of giddiness, and he has a very peculiar gait, that would indicate more or less paralysis.

Q. To what do you attribute that condition?

A. Regarding the cause of his present illness as having arisen from the date of that injury, I should certainly regard it as arising from that.

Q. Would you attribute it to any difficulty of the heart?

A. No, sir.

Q. Did you notice anything in regard to the grasp of the hand, whether there was any difference in the strength of the grasp of the hand?

A. I think the grasp of the right hand is noticeable.

Q. When did you first notice this murmur? How long ago?

A. I observed the murmur yesterday.

Q. Is that the first time you ever noticed it?

A. Yes, sir.

Q. Did you ever make a thorough examination of Hawthorne?

A. No, sir.

Cross-examination.

(By Mr. McNaught:)

Q. Of what college did you say you were a graduate?

A. College of Surgeons of Belleview, and the Pacific Medical College of California.

Q. You have a diploma from each of these?

A. Yes, sir.

Q. What year did you graduate at Bellevue?

A. 1877.

Q. You never made any examination of the condition of the plaintiff in this case until yesterday?

A. No, sir; my attention was more particularly directed to his head.

Q. And yesterday was the first time that you could discover this murmur, that you made any discovery of the murmur?

A. Yes, sir.

Q. And *what* examination was made yesterday after I examined you on the stand?

A. Yes, sir.

Q. And you found that the murmur disappeared when you laid him down on his back?

A. Yes, sir.

Q. Then no murmur at all?

A. No, sir.

Q. And that you found no murmur when standing up or sitting down indicating organic disease of the heart?

A. When standing up the murmur was more apparent; on sitting down it was very much less.

Q. On sitting down it was very much less?

A. Yes, sir.

Q. And lying down no murmur at all?

A. No, sir; none that I could discover.

Q. Could you distinguish when he was standing up or sitting down the murmur so as to indicate the cause—that is, whether organic disease of the heart or some other trouble?

A. No, sir; not before he laid down.

Q. Did you ever, in your experience, Doctor, know a case of that kind before?

A. I have seen one or two of that kind.

147 Q. Then you found that there was no murmur whatever lying down, and yet there was a very distinct murmur standing up?

A. Yes, sir.

Q. And that was the condition you found this patient in upon — yesterday?

A. Yes, sir.

Q. You say, Doctor, that there was a fracture of the head outer table, but not a fracture of the inner table?

A. Yes; I could not say. That would be a post-mortem question.

Q. You never examined definitely enough to ascertain?

A. No, sir.

Q. You testified on yesterday, I believe, that there was no evidence of paralysis?

A. Only subjective symptoms.

Q. What do you mean by that?

A. These he complained of himself. It is as I stated it here. I was not clear as to whether it was true paralysis or not.

Q. Then there is no evidence of paralysis you could discover in the patient that you yourself as his physician would say was paralysis?

A. No, sir; I cannot say that I could.

Mr. McNaught: That is all.

Dr. Kreigk, a witness on behalf of the plaintiff, after being first duly sworn, testified as follows:

By Mr. Haines:

Q. Doctor, what is your business?

A. Physician and surgeon.

Q. Are you a graduate of any medical college?

A. In Germany.

Q. What institution?

A. Seiberg.

Q. How long have you been practicing?

A. About 12 years.

Q. How long have you been practicing in Seattle?

A. Nearly four years.

Q. Have you ever devoted any attention to heart diseases?

A. Yes, sir.

Q. Did you ever examine Mr. Hawthorne, the plaintiff in this case?

A. Yes; the other evening.

Q. When did you examine him?

A. Yesterday evening.

Q. Who was with you?

A. Dr. Miller. And then I saw him also this morning. Dr. Willard and Dr. Miller were present.

Q. How thorough an examination was made by you?

A. I examined specially the heart and breast and chest, but the other parts I did not examine so thoroughly, but I think enough to have a good opinion.

Q. What condition did you find him in? Describe generally to the jury.

A. I found that he is a man of general debility. He is of a pale color, very anæmic looking. His lips are nearly white, and the same colored face. He is weak. His left leg seems to be stiff, and he always turns — out and keeps it further outside, and he complains about cramps occasionally in walking. He is not true in putting his leg in the right position; and other ways. He seems he is always keeping his hand on his front. He can put the pain in his skull inside as well as outside, and the pain outside he presses a little bit.

Q. What does that condition indicate as the cause?

148 A. It indicates that the man has very little blood. He is

very weak, and that he is suffering with a kind of nervous debility, nervous affection. It may be from the brains.

Q. Did you make any examination of the heart?

A. Yes, sir.

Q. Use any instrument to make it?

A. Yes, sir.

Q. What did you use?

A. A steth*e*scope.

Q. Tell the jury what you discovered on that examination.

A. I found in a standing position—I first examined him standing—I found a very clear noise from the apex, near the point of the heart—the most left part of the heart—a very clear, systol*l*ic noise. That is the second noise produced by the contraction of the heart, and this noise was so loud that it was clear to be heard the more far away I come with instruments; but it was so strong you could hear it quite a distance from the heart, but the other I could not. In a standing position it could be produced by the mit*ar*, but as soon as the patient laid down I could not hear the least little bit of a noise any more at all. I could hear the sound of all the other valves, the mitral valves as well as the other valves. I don't believe there is any organic trouble—that is, I don't believe there is any deterioration of the valves so that the blood cannot circulate through very well. The reason I believe that something like that is not, the heart is not atrophied. It is not enlarged. It would be enlarged when there is any kind of disease of the valves, but it is not. I looked clearly at the point of the heart. It is just inside of the line, about as wide as the finger (indicating), and it never shows enlargement of the heart. I got it as well as the steth*e*scope could, and I am sure it is not enlarged.

Q. To what cause would you attribute these things in the heart murmur?

A. I think it is anæmic noise, like it happens in other cases of anæmia. You can hear a noise in the heart in diseases of young girls when they are anæmic, pale, but it disappears when they get full. I remember a case: the blood gets less and less, thinner, and more water in the patient until he gets a skeleton; this noise in the heart gets very loud and clear; noise in the same place, and the post-mortem don't show any change in the valves. It was only produced by the apparent want of blood.

Q. What condition did you find his nervous system?

A. I think it is affected in some way. He is sick in his nervous system. There is cramps of the leg, and mainly you have to depend on what he says. He complains about queer feelings in his legs. He says it feels like snakes are moving up and down his leg; then in walking he always steps outside; he could not step on it in the right way, and could not move it well; and then the foot is not quite the same. There is numbness in the foot. There seems also to be debility of his foot.

Mr. Haines: That is all.
Mr. McNaught: No questions.

149 Willard C. Hawthorne, plaintiff, recalled.

(By Mr. Haines:)

Q. Mr. Hawthorne, are you acquainted with Mr. H. G. Smith, that was employed in the mill when you were there—the sawyer in the mill?

A. Yes, sir.

Q. On the morning when you were injured did you go up with Mr. Smith and examine the pulley of the trimmer?

A. No, sir.

Q. Did Mr. Smith tell you that he thought that the pulley of the trimmer was not fit to run, that it was dangerous, or anything of that kind?

A. No, sir.

Q. Did he tell you that he thought you ought not to run it?

Mr. McNaught: We object; it is leading.

A. No, sir.

The Court: Put your questions without leading the witness.

Q. Did you have any conversation with Smith that morning, the sawyer?

A. No, sir.

Q. Did he say anything to you in regard to the machine—in regard to the trimmer—its condition?

A. No, sir.

Q. Did you request him to go with you to look at the pulleys? Did you ask him to go with you overhead?

Mr. McNaught: We object, because it is leading.

The Court: Objection sustained. He can state what he had to do with Smith that morning.

Q. When you went to work there, Mr. Hawthorne, do you know how light it was? Do you remember whether it was light in the mill at that time?

A. At that time of year it was quite dark in the morning at 7 o'clock.

Q. Do you know Mr. Charles M. Spaulding?

A. Yes, sir.

Q. The Charles Spaulding that worked in the mill?

A. Yes, sir.

Q. Did you have any conversation with Mr. Spaulding that morning before you was hurt?

A. No, sir.

Q. Do you know whether he was working in the mill then or not?

A. Mr. Spaulding?

Q. Yes.

A. No, sir; he was not.

Q. Did you make any statement to Mr. Spaulding before you were hurt, in regard to the condition of the machinery?

A. No, sir.

Q. Or of the trimmer?

A. No, sir.

Q. Did you have any conversation with Mr. Spaulding, after you were hurt, about the trimmer or machinery?

A. No, sir; none at all.

Q. Do you know E. Plummer, Ed. Plummer—used to work there about the cars?

A. Yes, sir.

Q. Did you have any conversation with Mr. Ed. Plummer about the machinery or about your knowledge of the condition of the trimmer?

A. That morning?

Q. That morning or at any time after the injury?

A. No, sir; I do not recollect of any conversation at all.

Q. When did you last see Mr. Ed. Plummer?

A. He was at my house about three weeks ago.

Q. Did you have any conversation with him then in regard to the trimmer, or he with you?

A. I cannot remember.

150 Q. Did you before you were injured have any conversation with Mr. Plummer or he with you in regard to the condition of this trimmer?

A. No, sir; not to my knowledge.

Q. I wish to identify this hat for the purpose of showing the location of the wound. That seems to be material in view of the testimony of the physicians. Is that the hat you had on at the time of the injury? (Hat handed to witness.)

A. Yes, sir.

Q. Was this cut in the hat before you received the injury?

A. These holes were in there.

Q. How about these cuts?

A. These were made—that top cut was made there—in the injury.

Mr. Haines: We offer it in evidence.

Mrs. Hawthorne recalled.

(By Mr. Haines:)

Q. Were you present when Dr. Smith and Dr. Smart made the examination, and Dr. Minor, of Mr. Hawthorne?

A. Yes, sir.

Q. Did you state to Dr. Smart that the pain that Mr. Hawthorne suffered was the pain in the head—was in the skin?

A. No, sir.

Mr. McNaught: We object. It is not proper re-examination.

Mr. Haines: That is what Dr. Smart testified.

Mr. McNaught: The proper foundation has not been laid.

The Court: Objection overruled and exception allowed.

Q. Were you present when the examination was made by Dr. Willard and Weed?

A. Yes, sir.

Q. Did you make any objection about the examination of Mr. Hawthorne at that time?

A. No, sir; not anything more than to say what would save him——

Q. What did you say?

A. I told him I thought it would be necessary for him to be in court this afternoon and I wished to save him all the pain possible, for I thought it would be so very trying to come down here; that any extra pain or suffering would probably prevent any appearance of that kind.

Mr. McNaught: We move to strike it out.

The Court: Commencing with "I thought," you may strike it out, Mr. Reporter.

Mr. Haines: We except.

The Court: Exception allowed.

Mr. McNaught: We except for not striking it all out.

Q. Are you acquainted with E. Plummer?

A. I have met him once.

Q. Did he ever make any statement to you regarding what he knew about this case?

Mr. McNaught: We object. No foundation for the question, and leading.

The Court: In order to contradict him you would have to put the words in the witness's mouth.

Mr. Haines: That is difficult.

Mr. McNaught: We wanted them here. We wanted a continuance till we could get him here.

Mr. Haines: We would gladly have consented if we thought Mr. Hawthorne would have been alive when the case was brought up again.

151 Mr. Haines: We rest.

Mr. McNaught: If your honor please, I desire to rebut as to one fact, and in order to do that it is necessary for my medical experts to make a little more extended examination of Mr. Hawthorne than they have made. I called Mr. Haines' attention to this fact. Mr. Haines requested that I waive any further examination until after he had testified. I consented to do that. I desire now to have the opportunity to have the examination made, and we will conclude our testimony in a very few minutes.

Mr. Haines: The plaintiff is hardly in condition to be examined at this time. He is willing to submit to any number. Your honor sees the condition he is in and I don't believe he is able now.

Mr. McNaught: I am willing to have the examination made tomorrow morning.

The Court: What is the point?

Mr. McNaught: We want to examine him when he is in a reclining position; have our experts examine and see if that murmur has entirely faded away. Our physicians say that they have no sort of idea that such is the case, and I think in justice to themselves they ought to have that examination.

The Court: We are not trying the doctors.

Mr. McNaught: No; but it is material matter in rebuttal. That is a matter I think we should have the privilege of going into. It will be very short.

The Court: Is there any objection to it?

Mr. Haines: I do not wish to throw the slightest obstacle in the way of a thorough examination. They have made no examination of the patient reclining and we have called two physicians on that point. I think their examination should be limited to the same number. That is all I desire.

The Court: Gentlemen of the jury, you will observe the caution that I have given you and be promptly in your seats at 9 o'clock to-morrow morning.

June 29th, 1887—9 o'clock a. m.

Mr. McNaught: They have refused to allow our medical experts to examine Mr. Hawthorne. The court will remember that Dr. Miller said that there was no reason why an examination should not be made, and we think it very remarkable that our physicians were not permitted to make a full and thorough investigation. Mr. Haines said that he would consent to an examination by two physicians. We wanted four. We said they had only called two physicians. I said that he had the privilege of calling all the medical experts he desired and the case would be reopened for that purpose. We wanted a full and thorough investigation and we desired that the four should examine him, and Dr. Miller had testified that the examination would not hurt him, and that there was no reason why it should not be made. The four physicians went out and were refused permission to examine him. We desire a continuance and will file an affidavit.

The Court: For the purposes of this argument you may consider an affidavit made.

152 Mr. McNaught: That is the showing we desire to make. They have refused us, and we know of no way to get at the truth in this case and get it before the jury without this examination.

The Court: What is the benefit of a continuance? Suppose your application is granted, what advantage is it to you?

Mr. McNaught: If the continuance is granted with the information we have at this time and such information as the court could compel them to enable us to obtain would unquestionably unveil the truth in this case. We have reached the conclusion, if your honor please, that there is no serious injury to the head. We have reached the conclusion that there is serious injury to the heart; organic disease of the heart. We have reached the conclusion that this is a well-laid scheme to deprive us of teaching the truth, and therefore they have denied us this second examination, which the court said we could have upon last evening.

The COURT: The court made no order; simply permission.

Mr. McNAUGHT: Simply permission, of course. We took it as an order. It was with the consent of the court. The court said he was inclined to give us that permission, and we supposed, of course, that they would accord it to us without question.

The COURT: The matter was in the discretion of the court. It was not a right you have. You have had your experts examine the plaintiff and to their own satisfaction, with the simple exception of the head, which they did not examine thoroughly, one or two said, because the wife of the plaintiff said that she wished them to be careful and tender about it, and I think one said because she forbid or strong objection, or something of that kind; and there appears to have been no impediment; and had you asked permission last night to examine—that is all you had a right to—anything further would have been in the discretion of the court. It is not a matter you have a right to go into in the reply. You have exhausted your case in that matter. But notwithstanding a strict rule ought not to be held on re-examination or re-entry in the case in chief if in the interest or furtherance of justice it ought to be allowed. Sometimes a case is stopped in argument to the jury and the parties are allowed to call a witness on some point that is omitted. That is the correct rule, but where it is the testimony of experts of this character I will overrule the objection.

Mr. HAINES: I desire to say in regard to our refusal that there has been no refusal at all.

Mr. McNAUGHT: I will say that he informed me that he would not allow us four physicians to examine him.

The COURT: Mr. Haines said he would consent to an examination and asked the court to restrict it to two. I made no order in the matter.

Mr. HAINES: I make this proposition: That Dr. Minor go there and make the examination, and that at any time before the argument in this case is closed he may testify to the jury his actual condition. The man is ill, and it would be cruel to allow so many to examine him.

153 The COURT: That matter is disposed of.

Mr. McNAUGHT: We would like an exception, and would like the record to show the application on yesterday.

The COURT: You may state on your minutes, Mr. Reporter, that the statement made by counsel is on the written affidavits and passed upon the same as though it were a formal application.

(Argument to jury by counsel for plaintiff.)

And after the evidence had been concluded and before the argument had beec commenced the defendant, by its attorney, submitted to the court instructions to the jury, plainly written on separate sheets of paper and numbered, as follows:

* * * * * * *

Instruction No. 7.

If you find the machinery in question was defective, and also find that the defendant knew it, yet if you find that the plaintiff continued to run, operate, and manage the same with knowledge that it was unsafe, then your verdict should be for the defendant.

Instruction No. 8.

If you find from the evidence that on the morning before the plaintiff received the injury complained of he examined and inspected said machinery in connection with Mr. Smith and found that the same was defective and dangerous, and was then and there advised by the said Smith not to operate or run said machinery on that day, and the plaintiff, notwithstanding such knowledge and information, commenced running and operating said trimmer, and while so operating it received the injury complained of, then he assumed the risk, and your verdict must be for the defendant.

Instruction No. 9.

If you find that the plaintiff had knowledge, at and prior to the time of the injury, that said machine was dangerous and unsafe, then I instruct you that, notwithstanding you may find that the defendant had knowledge thereof, that there is no evidence in this case of a promise by the defendant or any one having the right or authority to make such promise to repair the same within a definite or reasonable time, and if you find that the plaintiff with such knowledge of the unsafe and dangerous condition of said machinery continued to use the same up to the time of the injury, then your verdict should be for the defendant.

Instruction No. 10.

If you find that the machinery constituting the trimmer in question was used for five or six years in said saw-mill prior to
154 said accident by the various owners of said mill and the various employees, then that is a strong circumstance to be considered by you as tending to prove that said machinery was not defective in structure or material used therein.

Instruction No. 11.

If you find that a machine like the one in question was used by the Port Orchard and Commercial mills and also at the defendant's mill for 5 or 6 years without injury to the employees, and that the said machinery was considered by the employees running the same and the foreman of the mill to be safe if the same was kept properly babbitted and oiled, then you cannot find that the defendant furnished insecure and unsafe machinery, and your verdict must be for the defendant.

* * * * * * *

Instruction No. 16.

It is not necessary for the defendant to establish in this case that the plaintiff had knowledge of each and every defect in the trimmer; but if the plaintiff had knowledge or the means of knowledge of any defect in the construction or failure to repair the same, rendering it unsafe or dangerous, and did not immediately stop operating the same, but, without notice to the defendant's agents or officers, and a promise to repair, continued to operate the same until the time of the accident, then he cannot recover, and your verdict must be for the defendant.

Instruction No. 18.

It was the plaintiff's duty to use reasonable diligence and care in inspecting the machinery operated by him and report to the master mechanic, foreman, manager, superintendent, or other agent of the company all needed repairs. There is no evidence in this case that the plaintiff made any such reports. The burden of proof is upon the plaintiff to prove that he made such reports whenever reasonable care and caution required him so to do. There is evidence in this case tending to prove that the want of babbitting contributed to the cause of the fall of said pulley; and if you find that the want of proper babbitting did in any degree contribute to or in any way assist in driving off the nut holding such pulley, then your verdict must be for the defendant.

Instruction No. 26.

If the jury find that the plaintiff has organic disease of the heart, so as to incapacitate him from earning anything, then they shall not, in considering the amount that he is entitled to recover, if he is entitled to recover anything, allow him anything for loss of time in the future.

155 And the defendant then requested the court to give said instructions to the jury, and the court refused each and all of said instructions.

And after the conclusion of the evidence and before submitting said cause to the jury the defendant, by its said attorney, presented to the court in writing the following questions of fact, and requested the court to direct the jury to make special findings thereon, viz:

I.

Was the plaintiff, on the day of the accident and prior thereto, informed by —— Spencer or any other person that the trimmer or any part thereof was in bad condition, or that the pulleys connected with said trimmer were liable to come down upon him?

II.

Did the plaintiff know at and prior to the time of the injury that said pulleys were shaking and in a dangerous condition; and, if he did not know it, in the exercise of ordinary care and dilifence could he have discovered it?

III.

Did the plaintiff, soon after receiving the injury complained of in this case, say that on the morning of the day he received said injury that he found by examination of the machinery that the same was not in good running condition, and that for the reason that the same had not been oiled it had become heated and melted the babbitt in the pulley, and that caused the same to drive the nut off of said pulley and cause- the pulley to fall?

IV.

Did the plaintiff not also say, in the presence of C. M. Spaulding, in Seattle, King county, Washington Territory, soon after the injury complained of, that before going to work in the mill on the morning of the day he, the said plaintiff, received the injury complained of in the complaint that he was informed by one of his fellow-workmen in said mill of the dangerous condition in which said machinery was at said time and advised not to undertake to run said machinery on said day, or words to that effect?

V.

Had the plaintiff prior to the injury frequently examined said trimmer and the machinery connected therewith, especially that portion of it claimed to be defective; and did he know its condition and the character of the structure; and was he fully informed of all the defects, if any, in the construction thereof, and of all, if any, of the defects of the material used in said machinery, and of all or any defects therein?

156 And the court refused to submit said questions of fact to the jury and refused to direct the jury to make findings thereon; to which rulings of the court in refusing to submit said questions of fact to the jury and in refusing to direct the jury to make findings thereon the defendant at the time excepted, and its said exception was allowed by the court.

JUNE 29TH, 1887—1.30 p. m.

Closing Address to the Jury on the Pact of the Plaintiff by J. C. Haines, Esq.

The COURT: Mr. Haines, you have 40 minutes of your time left.

Mr. HAINES: If the court please, and gentlemen of the jury:

The first point made by my learned friend is upon the proposition which be claims to be established in this case, that the testimony shows by four disinterested witnesses that Mr. Hawthorne had actual notice of the danger he was incurring by running that machine on that morning, and I certainly must give my friend all credit

possible for the ingenuity with which he has presented that proposition; but a careful analysis of the testimony will show you that his ingenuity has been even greater, possibly, than you would at first suppose, because there is absolutely nothing to found the ascertion upon that Mr. Hawthorne's testimony in this case is met by four disinterested witnesses or by any other number of witnesses whose testimony can be relied upon in rendering a verdict in this case. Now, let us take Spaulding. It is claimed that Mr. Hawthorne does not deny the statement of Mr. Spaulding. That statement is set up in the affidavit which we, in order to obtain a trial at this term of this court, were compelled to allow in evidence. This is what Spaulding will say (reads): That the said plaintiff, soon after receiving the injury complained of in his complaint in the above-entitled action—Spaulding will testify—that the said plaintiff, soon after receiving the injuries complained of in the above-entitled action, said that on the morning of the day he, the said plaintiff, was injured that he found upon an examination of the machinery that the same was not in good running condition, and for the reason that the same had not been oiled and had become heated and melted the babbitt in the pulley and caused the same to drive the nut off the bolt holding said pulley and caused the pulley to fall, and that the said plaintiff, before going to work in the mill on the morning of the day that the said plaintiff received the injury complained of in the complaint in the above-entitled cause, was informed by one of his fellow-workmen in said mill of the dangerous condition in which said machinery was at said time and advised not to undertake to
run said machine on said day, and, without anything other
157 or further appearing, the said plaintiff with said knowledge
undertook to run said machine, to wit, the said trimmer, in the condition aforesaid; that said plaintiff made said statements at the time aforesaid in Seattle, King county, Washington Territory, in the presence and hearing of the said Spaulding.

Now, that is a conversation with Spaulding. I would like to know where that conversation was had. They say that Spaulding is the only man by whom they can prove that; and yet they don't really prove that he had a conversation with Spaulding. If he did, why don't they tell us where that conversation was had? Mr. Hawthorne says that he had no such conversation with Spaulding. He never talked to him on the subject. But it would not make any difference. This statement of Spaulding bears upon itself conclusive evidence of absolute falsehood. And why? (Reads:) "That the plaintiff, soon after receiving the injury complained of in the above-entitled action, said that on the morning of the day he, the said plaintiff, was injured that he had examined the machine there and found upon examination that it was not in running condition, and that for the reason the same had not been oiled and had become heated and melted the babbitt out of the pulley and caused the same to drive the nut off from the bolt."

When the accident occurred, according to the statement of Spaulding, and I have it here that Mr. Spaulding will testify that, Mr. Hawthorne told him that after the accident he went down and examined that pulley and examined the shaft, and found how it was the injury had happened, and discovered that it was not oiled and the pulley slipped off. What are the facts in regard to the matter? Consider them. Mr. Hawthorne for four weeks could never leave his bed, and for six weeks he could not walk; and yet, according to Spaulding's testimony, on the day, probably, of the injury he went down to the mill and examined the pulley, when he was absolutely unconscious, and found that the injury had occurred by reason of its not having been oiled. Now, that is Spaulding's testimony; the testimony which the evidence and the conceded facts conclusively show is an absolute falsehood. The idea that Mr. Hawthorne, six weeks or a month after, should walk down to the mill and examine the shaft to ascertain how the accident occurred, after they had been running this trimmer constantly in the mill for over a month, and that he then found how the injury had been received! So, if Mr. Hawthorne had never opened his lips in regard to this conversation, as claimed by Spaulding, it would not make any difference, because the fact is absolutely absurd on its face, and it shows to what extent the defense in this case has been driven to delay this cause until the injuries of the plaintiff have become so confirmed and so severe that it will be impossible for him to appear in court and testify before a jury of his fellow-men.

By Mr. McNaught: I want to save an exception to that statement just made by counsel.

The Court: Note an exception, Mr. Reporter.

158 (Haines:) Now, take Plummer's testimony. That is one of the disinterested witnesses who are always on hand on occasions of this kind against corporations. They have always got a list of disinterested witnesses who can come in here and outswear any poor man who happens to be injured through their negligence.

Mr. McNaught: We ask an exception to that statement.

By the Court: Note an exception.

Mr. Haines: What does Plummer say? He is in eastern Washington, and this railroad company can't raise money enough to send over and get Mr. Plummer. They say they believe Mr. Plummer will swear to the facts stated in this affidavit. Mr. Plummer says (reading) that the plaintiff had frequently examined said trimmer and the machinery connected therewith, especially the postion of it claimed to be defective, and knew its condition and the character of the structure, and *were* fully informed of all the defects, if any, in the construction thereof, and of all and any defects therein, and that with such knowledge plaintiff, without further appearing, continued to use said machinery up to the time he received the injuries complained of in the above-entitled cause.

Plummer, they say, will swear to anything they want to prove in this case in regard to notice. It is claimed by my learned friend that this testimony is conceded by Mr. Hawthorne. I say he denies any conversation with Plummer. He testifies that he never said a word to Plummer on that subject. How else could Mr. Plummer know that Mr. Hawthorne knew anything about the machinery? Why, there is only one other way, and that would be that he saw him examining it; and my learned friend says that Mrs. Hawthorne don't dispute but that he knew all about this machinery. Now, let us look at the evidence in the case; probably that will be more valuable in considering that point than my learned friend's statements.

Mr. Hawthorne—on page one of his testimony I find I asked him this question (reads): Did you know prior to the time of the accident, before you received the injury, how the pulley was fastened on the shaft? Then Mr. McNaught makes a long objection, which is overruled by the court. "Yes; kept on by a nut." Question. "Did you know which way that nut turned?" "Well, I was told." Now, Mr. McNaught stated to the jury that he said he was told, but he didn't say he didn't know. He said simply that he was told. "I was told—I did not know any further than I was told—that when the pulley turned it turned the nut on." That is his knowledge on the subject. He was told by some one there that the nut turned the other way, and he believed it. Now, Mr. McNaught, he takes a hand at the examination of the witness, and he says: "Mr. Hawthorne, you say that you don't know much about machinery or running a trimmer when you commenced to work in this mill of the defendant?" "No, sir." "That you had never run a trimmer like this before?" "No, sir." "Did you ever examine those pulleys on the trimmer in this mill?" "No, sir." "Merely went up to oil them; that is all."

I would like to know if that is not denying Mr. Edward Plummer's testimony? He says he never said anything to him
159 about it. He says he never knew anything about it. The
only thing that he ever did was to go up and oil it three times a day. Every expert that has been asked that question says no other men working there could tell which way that nut turned, unless he had put it on or taken it off, and he believed that it turned the other way; and he had a right, as the court will instruct you, to rely upon the obligation of the employer to furnish safe and suitable machinery, and had a right to believe that this corporation would protect him by the exercise of all reasonable care; and he had a right to believe that that nut turned in the way that they usually did in saw-mills, and that if the pulley bound upon the nut that it would turn the nut on instead of turning it off.

But that is not all in regard to the falsity of this claim. How does Edward Plummer testify? It is not Mr. Plummer's affidavit. It is a statement by them that he would so swear, and I assume for the purposes of this case that he would do so. Plummer could only know that Mr. Hawthorne knew of the condition of this machine by having seen him examine it. Now, Mr. Hawthorne was at work there every day for several days—in the neighborhood of twenty days—just before this accident occurred, and he oiled this machine three times a day. Men were all around him, and they have not been called as witnesses. Is there one single man in that mill that will come before this jury and swear that Willard C. Hawthorne ever examined that machine? Oh, but they say he was familiar with the construction of it.

Spaulding says that you could not tell anything about it unless you took the nut off, and they used to take that off with a pair of pipe tongs three feet long, and also that you could not start them with a wrench, and unless you got the nut off you could not get the pulleys off. They had a master mechanic there, a man in charge of the machinery, and do you believe they would have allowed a man that was working in the shop at the rate of two dollars a day to go up there and take that machine to pieces to find out how it was constructed? Not much! That isn't the way they do business; and if Mr. Hawthorne had gone to investigating that machinery, had gone up there with a pair of pipe tongs to try to unscrew that cap and take that pulley off, he would have been invited to come around to the office and get his pay at the rate of two dollars a day. That would have been the result of it, and so it is perfectly apparent in this case that this claim that Spaulding and Plummer would so testify is absolutely false, or that Spaulding would testify to it, or they would testify to it, it is absolutely false, because Spaulding's statement is absolutely impossible. It is impossible that it should be true; and Plummer's testimony, if it be testimony, is met by Hawthorne's, and also by the fact that they cannot produce a single witness that ever saw Hawthorne inspecting the machinery in any way. So much for these two disinterested witnesses. They may be disinterested, but, if they would swear to such a statement, *that* it would be very difficult to make anybody believe that they testified that way from disinterested motives.

160 Oh, but Mr. Spencer, he is another disinterested witness. I won't dwell any time on Mr. Spencer's testimony. Mr. Spencer says that at half past 9 o'clock he notified Mr. Hawthorne that that machinery was dangerous, when Mr. Hawthorne was lying in an unconscious condition, and was brought into the house when the university bell rung at half past 8; that is just as accurate as Mr. Spencer is in regard to that transaction.

Mr. Smith was another disinterested witness. Mr. McNaught says that Mr. Smith, at my solicitation, was up at Mr. Hawthorne's and stated to Mr. Hawthorne that he notified him that morning. Mr. Smith upon that occasion made two statements and both were false. One statement was made in the interest of the defendant and the other was made in the interest of the plaintiff. He stated that he notified Mr. Hawthorne that morning that Mr. Burgess had promised to fix the machinery; that statement was intended for the benefit of Mr. Hawthorne at the time. It was made as a statement of a fact in the case. He stated to Mr. Hawthorne that he had notified Mr. Burgess, and that Mr. Burgess had promised to fix it, and he also said that he told Mr. Hawthorne that that machine was dangerous. Upon reflection Mr. Smith concludes that when he notified Mr. Hawthorne on that morning that Mr. Burgess had promised to fix it that he told that which was not true, and upon further reflection he concludes that when he told him it was dangerous he told that which was true. Well, now, upon the testimony of a witness like that what are you to say? Which of these statements was true? He made them both. One he takes back and the other he adheres to. There is no more reason he should take one back than the other.

Now, these are the only witnesses who in any way, according to the most sanguine claim of the defendant, tend to establish the fact that Mr. Hawthorne had any notice of the fact that that machine was dangerous.

Oh, but they say: "He saw it shaking; they don't deny that." Well, now, Mr. Morris was there when this accident occurred and he testified that he saw nothing unusual in the conduct of that machine. I read you from the testimony of Mr. Spencer, and he says it was nothing more than usual. I now read from Mr. Hawthorne's testimony on page three. They say he does not deny but it was shaking.

Mr. McNaught: I desire also an exception to the last statement.

The Court: The exception is allowed.

Mr. Haines: Page 3—"State if you noticed anything unusual in the condition of the trimmer and the way it run that morning. A. No, sir; I did not."

That is Mr. Hawthorne's testimony, and that is what Mr. Spencer said very nearly; that it was not shaking more than usual; that is what Mr. Morris says. So there was nothing about the machine to attract anybody's attention and especially to attract Mr. Hawthorne's. He was not an expert in machinery. He knew only enough about that machine to run it. It was all he agreed to do.

161 But, after all, it is a simple question, not of counting noses as regards witnesses. You are here to decide this question as men, and you are here to say upon your oaths whether, under the testimony in this case, no matter *where* the number of witnesses is, what your belief is. Can you believe that Mr. Hawthorne on that morning knew the risk he was running in operating that machine? Now, as a matter of fact, it makes very little difference in this case whether you believe the statements of these witnesses who say they notified Mr. Hawthorne or not. What did they say to him? Why, one of them said, "That pulley is likely to come down. It is dangerous." And another said, "I don't think it is in proper condition to use, and I wouldn't work there." Mr. Spencer told him he had better look out. "Well," he says, "I will do the best I can." Now, what is the rule of law? The mere fact that somebody said to him, "That machine is dangerous"—that is not sufficient to defeat recourse against the company. The court will instruct you that it must be such a notice as would cause an ordinarily reasonable and prudent man to desist from proceeding with the work. Now, none of those witnesses knew how that nut turned. Neither Mr. Spencer nor Mr. Smith knew how that nut turned. Any man with any experience in saw-mills would suppose it turned the other way. There can be no doubt in the world but that that

was the cause of the accident; that the nut turned the wrong way was the cause. Now, did anybody tell Mr. Hawthorne the risk he was running? Nobody told Mr. Hawthorne, "Mr. Hawthorne, the nut on that shaft turns differently from nuts in saw-mills usually or other nuts usually turn. It turns right-handed instead of left, and when that wheel binds at all upon that cap that nut is bound to come off and that 50-pound wheel to fall upon your head." Not one. He was told it was dangerous; to look out. Conceding *that* what these witnesses say to be true, I think, gentlemen, that you will be able to find from the facts in this case and from looking at it that it shows nothing unusual. He says he had just oiled it that morning. What would he conclude? That they were all mistaken. He saw no evidence of it, and if under the circumstances an ordinarily and reasonably prudent man would have gone on with that work, even if these warnings had been given to him, then certainly he is not in fault for so doing, and he cannot be negligent. Now, you must look at this in the light of common sense. Here is a man working for a mere pittance, a man with a family on his hands to support. He goes into that mill, and above him hangs this shaft, with those heavy pulleys revolving at a rapid rate, probably 8 or 9 feet above his head. There is a nut on that shaft, and if through the stoppage of the holes in the shaft or the thickening of the oil the oil does not flow down there just right, the pulley may bind on that nut and turn it off, and death is almost certain. Do you believe that a man under those circumstances, a man of intelligence, as Mr. Hawthorne evidently is; a man who had his own interest and the interests of his loved ones at heart—do you believe that that man, if he had any idea of the actual condition of that machine, would have worked there a second? No, indeed. It is absurd and ridiculous to say, no matter what these men may
162 testify to, that Mr. Hawthorne ever knew the risk that he was running, or ever knew that there was any danger of the accident happening that did happen, or ever knew that this defect existed in the machine.

And in this case, then, all this talk about notice amounts to nothing, unless he was put upon his guard against the defect which caused the accident; then it is not his fault. And notice his reply to Mr. Smith, where he says to him, "This machinery is dangerous, and I wouldn't use it." Well, Mr. Smith says he said, "Some one has to work here; some one has to work here." Do you believe he would have given that reply if he knew that every turn of that pulley that nut was liable to fly off across the mill like a rifle ball, or the wheel liable to drop, in all probability, upon him? No indeed! Men do not act that way; and especially men do not do that dangerous work—men of families, men of intelligence, men with others dependent on them—at the rate of two dollars a day. Oh, but they say, the pulley was safe; that it was perfectly safe; that they tried it for a long time and it didn't fall off more than five or six times, and hadn't killed anybody up to date, and as long as they kept it well babbitted and oiled why in all probability it wouldn't fall off. And that is the way the men in the mill—they allude to the testimony of Mr. Spaulding on that point. Now, what did Mr. Spaulding testify to? Mr. Spaulding testified that it was the general impression in the mill that that machine was perfectly safe if properly babbitted and oiled, provided everything was all right—provided the nut was properly put on. He was careful to put that in. They say that falls heretofore occurred from its not being oiled. There hasn't anybody testified to that at all. The nut—how about that? That nut was put on there, gentlemen, by some (interrupted)——

Mr. McNaught: We except to the last statement.
The Court: The exception will be noted.

Mr. Haines: That was put on there by somebody in the mill of the defendant, of course; probably by Mr. Campbell, the master mechanic. He was the man who knew of this pulley that seemed to be working off at odd times all through these years; that whenever that pulley fell off he was the man to put it on. And yet the defendant has not called a single person here to show that that nut was properly put on the last time it was put on—not one. The man who put that nut on is probably an honest man, and he, if he put it on improperly, would not be willing to testify that it was properly put on. Why did that nut fall off? Mr. Spaulding says, and Mr. Spencer, that it would not fall off, even when it was not properly babbitted, if it is properly oiled. Mr. Hawthorne oiled it that morning; that is the evidence in the case, and no dispute. Then it was properly oiled. If the holes in the shaft, gentlemen, got blocked up, what made the nut come off? Why, hear Mr. Spaulding's testimony. The nut couldn't have been properly put on. And it is a very significant fact that the defendant in this case has been unwilling to produce to this jury either the man who put that nut on or account for his adsence. Very singular, indeed! What must be the conclusion? Why, that Mr. Hawthorne oiled it as he says he did, and which
163 is not disputed; that the nut when it was put on the last time
was not properly put on, and that is the reason why it came off. But it don't make any difference in this case what the reason was, whether it was because there was a blocking of the holes in the shaft and the oil did not get onto the shaft, and thereby it ran dry, or whether it was not properly put on. In both cases it was the fault of the defendant. But we can reconcile with all the testimony in this case the fact, as Mr. Spaulding says, that although it was safe when properly oiled and babbitted that it was not safe when the nut was not properly put on; and when we add to that fact the fact that the defendant don't bring the man who put it on there, although he must have been a man who occupied some position of authority in the mill of the defendant, it seems to me that we can say that it is conceded in this case, as my learned friend says so often, that that nut was not properly put on, and, if that is so, then you ought to find a verdict for the plaintiff, because they don't pretend that it was safe, even when properly oiled

and babbitted, unless that nut was properly and thoroughly in place.

It would be a very dangerous thing for courts or juries to ever adopt the rule that the preponderance of evidence is to be settled by the number of witnesses. Take a case like this: Here is a man employed in their mill, a large, wealthy, powerful corporation in all probability, or they would not be operating a mill and a railroad, as has been disclosed in the evidence. Now, there are a great number of employees—a great number of servants in the employ of the corporation, and here is a man working in a mill, and he is injured. He is injured through the negligence of the corporation as Mr. Hawthorne was in this case; and now if it is settled as a rule that the number of witnesses carries the day, then all that corporation has to do is to employ in their mill and on their railroad instead of good workmen good witnesses, men who can swear readily and men who have no conscience, and then the railroad company and the mill company will never be liable for any damages, if that rule is established.

Mr. McNaught: We except to that statement.
The Court: Exception allowed.

Mr. Haines: How easy to defend suits for damages! But, thank God, that rule never can become incorporated in our jurisprudence. You are here, gentlemen, to judge upon the facts. You are here to look at this matter in the light of common sense, and, no matter how many employees of the defendant may come upon the stand, you are here to ask what is the truth about this thing, and when they come and tell you a story which no sensible man would testify to you are not bound to accept the testimony simply because they swear to it.

Why, I suppose, gentlemen, that if they thought it was necessary to prove an *alibi* for the mill and to prove that the mill at the time that this happened was on the summit of Mount Rainier they could find plenty of witnesses to do it, if the number of witnesses settled it. You would be bound to believe that, if there were eight or ten witnesses to swear that at that time this mill was on the top of Mount Rainier. But you are not bound to believe it was there; and on the same principle you are not bound to believe their theories in
this case. Now, we have the witness Smith, and he says
164 that Hawthorne asked Smith about —, and Smith told him
it was dangerous that morning; and, again, Spencer says he told him it was dangerous, and that the pulley was rattling so you could hear it all over the mill. Here is Mr. Hawthorne working for a mere pittance; a man with others depending upon him deliberately and voluntarily—nay, willfully and deliberately—rushes into danger; deliberately rushes into almost certain death. Does any man upon this jury think that if he was working there and had this wheel up over his head and knew that that nut was liable to fly off—that it was liable to turn off—if there was the slightest friction, and that if it did turn off the chances were that the wheel—that the pulley—would hit him, that he would work there at all? Not a

bit of it; and Mr. Hawthorne, you must concede, is a man of at least ordinary intelligence and ordinary solicitude for himself and for his family. It don't matter how many witnesses testify in this case that he was notified of this degree of danger, it is perfectly evident from the admitted facts in the case that that testimony cannot be true.

Now, they have made a most unwarrantable attack on Mr. Hawthorne and, I say, a most brutal attack upon his wife. They have charged here, gentlemen of the jury, that Mr. Hawthorne is assuming most of his injuries; that he is here as a pretender. The idea! Willard C. Hawthorne, whom Dr. Smith testified and all these physicians, brought here by the defendant, testify stands now face to face with death; a man who is in the last stages of the heart disease, and a disease which is liable to cause him to faint away at any moment of sudden excitement; the man who, when this case was liable to be called, could not endure the strain and excitement of coming in a hurry to this court-room, but fell fainting on his way; that man, they say (interrupted)——

Mr. McNaught: We except.

Mr. Haines: That man, they say, is a perjurer, a villain, and a swindler; that he is trying to swear, with false and perjured testimony, this case through; but that company has taken just one step too many when it took that step in this case, it seems to me. A company which would continue in that mill that machine, which was nothing but certain death—a wheel falling constantly—without the slightest effort to repair it—that company would allow the man they had injured, as Mr. Hawthorne was, to be forced into the courts to get his just claims, and now it remains as the last act of infamy for them to make that charge against him, and, worst and vilest of all, gentlemen, to make the charge against his wife that she is an accomplice in this infamous, outrageous swindle; and if you believe that—do you for a moment? Can any man who has a spark of manhood left in his veins say that that poor, patient, suffering woman is here as a perjurer, as a criminal, as a conspirator with Willard C. Hawthorne to wrest from this railroad company a few thousand dollars?

Oh, but she wouldn't allow the doctors to examine him! Could anything be more pathetic than her words when these physicians, sent there by the defendant, went to examine his head? What
did she say? She says, "Be careful; don't hurt him." That
165 is all; the more tender solicitude that any wife would have
for a husband, and especially when that husband is helpless.
That is all that this wife said, and yet, for that tender act of wifely devotion she is charged in this court-room as being an accomplice in a contemptible conspiracy, Well, gentlemen, if you can believe that story, then you have certainly got more credulity than I gave any of you credit for.

I don't care to dwell upon this medical testimony. The testimony of the defense in this case is as valuable to us, so far as establishing Mr. Hawthorne's damages, as the testimony for the plaintiff. Every physician on the stand admits that it is possible that the very condition in which they say they found him was occasioned by the shock or fall resulting from this injury. We have the testimony of Dr. Baker, a physician of many, many years standing, and a man who in his deposition admits that he never expects to get well; a man without any interest to serve; a man without any hope hereafter of any fees or recompense from a railroad company—he comes here and honestly and plainly tells you that from the injury Mr. Hawthorne received he is, as he says, ruined for life, and he will never be able, in his opinion, to do any work or be of any use or benefit to his family hereafter. Dr. Baker examined Mr. Hawthorne, and he says that up to the time of the injury, so far as he could didcover, he was in perfect health, and from the time of the injury, or from the time he examined him, he was physically an absolutely hopeless wreck. And I am willing to rest the case, as far as medical testimony is concerned, upon the testimony of Dr. Baker, or upon the testimony of this defendant's witnesses. One of them admitted that he did not know, and the doctors did not know, what caused heart disease. How absurd, how ridiculous, that Willard C. Hawthorne, the farmer, the soldier, the carpenter, the workman, a man as strong and healthy as most of the men upon this jury up to the date of the accident, at the instant of the falling of this wheel began to delelop organic disease of the heart! Why, I am surprised that my learned friend whould seek to advance such a theory as that! And yet I don't know that I can blame him; because, you know, desperate cases require desperate remedies; and this, certainly, is the most desperate remedy that he could possibly conceive of.

Now, gentlemen, this has been a long case. You have listened to it very carefully and attentively. It is a case of great importance. It is a case that demands your calm and impartial judgment as men. We don't want anything in this case except what is right; but that we do want. And I ask you when you come to consider this case to remember the fact that, notwithstanding all the charges that have been made against Willard C. Hawthorne in the argument, the charges that have been made against his wife, that there don't exist a person in this community whom they could call to breathe one syllable of reproach against his word as a man, or his oath as a witness. They may attack him in argument; they may bring their witnesses and their affidavits, and say after they have done that that Mr. Hawthorne has not told the truth. But if they would open the door to show the record of his life, we would be very glad. They have not done it. They could not cast one stain or blot upon him, and he stands before you an
166 unimpeached and unimpeachable witness. Of course, in his condition his testimony could not be as full and thorough as though he were in perfect health. He appeared upon this stand under a state of great excitement. The physicians all say that his nervous system is shattered; but he told you the truth—the plain and simple truth—and if you cannot believe that man who stands right before the curtain, which is liable at any moment to lift and

usher him into the dim hereafter, I would like to know who you can believe. Dying statements are regarded as of great sanctity in the law. The testimony of Willard C. Hawthorne in this case is no doubt the last testimony that he will ever be able to give, and if ever any man was under an obligation which would call for the truth and insure the truth it is a man in his condition. Now, as regards these damages—the amount—that rests entirely with you. We have claimed $15,00-.00 in this case. His life is absolutely destroyed; 23 years taken away. Even at the miserable pittance that he was earning in the employ of the defendant, he could earn $600.00 a year. As a carpenter his work was worth from three to four dollars a day. Consider the pain, consider the suffering, and consider the fact that your verdict in this case is all that this wife and these children have to look to for support during the years to come. Consider that your verdict is the only thing that can educate those children; that can feed them and clothe them; and, considering that fact, I am satisfied with any finding you may make.

And after said cause had been argued and submitted by the attorneys for both parties, the court gave the following instructions to the jury, viz:

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle.

W. C. HAWTHORNE, Plaintiff,
vs.
COLUMBIA & PUGET SOUND R. R. Co.
No. 5017.

Instructions of Court to Jury.

1.

This is an action brought by the plaintiff to recover of the defendant damages for injuries received by the plaintiff while operating and running a machine called a "trimmer" for the defendant. It was the duty of the plaintiff before undertaking to manage, run, and operate said machine to inform himself of the duties and dangers peculiar to such work, and the plaintiff in entering upon and into such work assumed all the ordinary risks in connection therewith.

167 2.

Plaintiff is to bee deemed as holding himself out, if no representations to the contrary were made, as possessing a fair measure of skill for the service he undertook to perform, and to be acquainted with the ordinary risks and dangers attendant thereon.

3.

I instruct you that the defendant was not under obligations, under all circumstances, to make use of the safest known appliances and instruments, nor is it responsible for a failure to discard one which is not such and to supply its place with something safer.

4.

The defendant is not an insurer of the safety of the machinery furnished, but is to use ordinary care and diligence in the selection, construction, and maintenance of such machinery.

5.

It is the duty of the plaintiff to oil, inspect, and carefully and cautiously observe the condition of the machinery he was operating and running; and if the plaintiff failed so to do, then he was negligent in that particular. It was also the duty of the plaintiff to use reasonable care and caution in observing the condition of such machinery, and if he found at any time that said machinery needed repairing, or that the same was not in a safe condition to be used or was dangerous, it was the duty of said plaintiff to report such defective and dangerous condition of the said machine- to the foreman, superintendent, or person in charge of said mill; and if he failed so to do, then said plaintiff was guilty of negligence in that particular, and if such negligence contributed to the injury complained of, he cannot recover.

6.

The plaintiff by his contract of hiring assumes the risks of injury, not only from the ordinary dangers incident to the employment, but also such dangers as are known to him or are discoverable by the exercise of ordinary care on his part; and if you find that the plaintiff continued to run this machine with knowledge that it was defective and dangerous or by the exercise of reasonable care and caution would have had such knowledge, without anything further appearing, and the plaintiff received the injury complained of, notwithstanding you may find that the defendant was guilty of negligence in furnishing said machinery and guilty of negligence in not keeping the same in repair, your verdict should be for the defendant.

7.

It is conceded by the pleadings that it was the duty of the plaintiff to oil said machinery; and if you find that the plaintiff did not oil the same in the manner and time that reasonable care and caution required him to do in managing and operating said
168 machinery, and by reason thereof the babbitt on the inside of the pulley melted, and that said melting of said babbitt left said pulley in a defective condition, and that the accident in question was caused in whole or in part by said neglect of plaintiff, then your verdict should be for the defendant.

8.

You are instructed that it was the duty of the plaintiff, if he found the machinery called the trimmer or any part thereof was out of repair, to report the fact to the company, its officers, agents, or superintendents; and if he did not do so it was negligence on his part, and the company will not be liable for any injury sustained by him caused by said machinery being out of repair in any respect in which he so found it to be out of repair and failed to report it or by reasonable care could have so found.

I instruct you that Mr. Smith or Mr. Spencer were not such officers or agents or superintendents of the defendant as that notice to them given by the plaintiff would be notice to the company.

9.

I further instruct you that if the plaintiff discovered the machinery he was using was out of order and dangerous to himself that it was his duty to stop using the same and to give notice thereof to the employer or the agents aforesaid and wait until it was put in proper condition; and if you find that the plaintiff did not do this after he discovered the defective condition, if you find that he did so discover it, and was injured by reason of the machinery being so in an unsafe condition, then the defendant will not be liable for the injuries complained of in this case, and your verdict should be for the defendant.

10.

There is evidence in this case tending to show that the trimmer was defective and dangerous at the time of the injury because the same had not been kept properly babbitted, and that evidence is for you to consider. I instruct you it was the duty of the plaintiff to use reasonable care and caution to ascertain whether the same was properly babbitted, and if it was not at any time, and he knew it, to report the same to the company or its agent there in charge. There is no evidence in this case tending to show that any such report was made or notice given by the plaintiff to the company. If the plaintiff failed to exercise reasonable care and caution in these matters and that failure contributed in any degree to the injury complained of, then your verdict should be for the defendant.

11.

Where the only witnesses to a question in dispute are the two persons whose testimony on that disputed point is in direct opposition the one to the other, and the persons are of equal credibility and there are no circumstances to shed any light on the transaction or strengthen the statements of either witness, the side in the controversy having the burden of proof must fail. The
169 credibility of all the witnesses is exclusively a question for
you to determine. In case of apparent conflict in the testimony, it is your duty to reconcile the apparent conflict if you can reasonably do so; but if you cannot do so, then you will consider the appearance of the witnesses, their demeanor on the stand, their opportunities for knowledge of the facts they testify to or the lack of opportunity, the interest of the witness, if any, and find the truth by carefully and conscientiously considering all the circumstances in evidence.

12.

I instruct you that the plaintiff is interested in the result of this action, and that fact should be considered by you in determining the weight to be given to his testimony.

The testimony of a person to the effect that he does not think that a certain fact exists or that he does not remember a certain thing is not entitled, other things being equal, to as much credit at your hands as the testimony of a witness stating positively that he did do a certain thing mentioned by him. In other words, other things being equal, the testimony of the plaintiff that he does not think that Spencer informed him on the morning of the accident, before it occurred, that the trimmer was in a bad and dangerous condition is not entitled to as much credit at your hands as the testimony of Mr. Spencer, the plaintiff's witness, who testifies that he did so inform him.

13.

As to the testimony of C. M. Spaulding and E. E. Plummer, the court instructs you that the defendant moved for a continuance for time to obtain the deposition or testimony of the said Spaulding and Plummer; that to avoid a continuance and secure a trial at this term of court, the plaintiff admitted that the said Spaulding and Plummer would testify to the facts set forth in the affidavit read to you, and that for the purposes of this case they are deemed to have so testified, and you must consider the statements in such affidavits to which it is averred they would testify the same as though they would have been introduced upon the witness stand and sworn and testified to the matters and things therein contained before you personally.

14.

For the purposes of this case you are to regard the said Spaulding and Plummer as disinterested witnesses, unless the contrary appears, and the plaintiff as an interested witness, so far as his interest is shown. Other things, then, being equal, if you find that the plaintiff has testified differently from the said Spaulding and Plummer, then you will give credit to the testimony of the said Spaulding and Plummer in preference to that of the said plaintiff.

You are to weigh and judge of this matter in the same manner as you would were Spaulding and Plummer here in person giving the same testimony, and you will give the same test to their evidence, so far as possible, as if they were present and testifying.
170 You cannot have the means of judging of their testimony by their appearance on the witness stand, as they are not here; but you have their statements, and you have the right to judge of their evidence by the reasonableness or unreasonableness of the statements and the circumstances stated by each of them in the same way and manner as other witnesses.

15.

If you find from the evidence that the plaintiff on the morning of the injury and prior thereto was informed by Spencer and Smith or either of them that the said machinery was dangerous, and that notwithstanding such information he continued to operate the same up to the time of the injury, without other or further thing appearing, your verdict should be for the defendant.

16.

It is claimed in this case that plaintiff was notified shortly before the injury was inflicted, for which he brings this action, that this machine was in a dangerous condition or out of order and likely to fall. You will remember that testimony; and, notwithstanding this notice, he negligently continued its use, resulting in the injury complained of. If you find from the evidence that this is true, then your verdict must be for the defendant.

17.

You are the exclusive judges of the evidence and the weight to which it is entitled.

18.

If you find that plaintiff was so notified, it will be binding upon him or not binding upon him according to the circumstances, and you must find from the evidence whether the notice given was binding upon him or not and to what extent it was or was not binding if given.

It would be of controlling influence if from the notice given he would be put upon his guard as to a fault or defect in or dangerous condition of the machine to be ascertained by reasonable care and prudence on his part. If he, by pursuing the notice given him, from the knowledge he would be presumed to have had of the machine or ought to have acquired in its use, *he* would have been led to a knowledge of the fault or defect, then he must be charged with that knowledge, whether he had it or not, as it would in that case be his own neglect if he did not have it.

If, on the contrary, the notice was not of such a character as to naturally and reasonably call his attention to the fault or defect or danger, or was so general in its nature that he would not thereby reasonably be put upon his guard, and by the exercise of ordinary care and prudence on his part under the circumstances be led to a knowledge of the defect or fault or dangerous condition, then he was not in fault. In other words, if you find that the notice was given to him he would be chargeable with the duty of such care
and diligence as a reasonable prudent man would and ought
171 to exercise in that place, at that time, in that business, with
that machine, and with that notice given to him.

If the casualty grew out of or resulted from a fault or defect in the construction of the machine itself of which his employer had notice and he had not, and which he would not be presumed to know from the nature of his employment and his use of the machine, and if the notice given was not such as would naturally or reasonably lead the attention of a prudent, careful man to the danger or fault, and if such danger or fault was not of itself to be seen or manifest, then such notice would not be sufficient to charge him with negligence in his continued use of the machine.

Plaintiff's Instructions.

19.

No. 1. The employer is obliged, whether a natural person or a body corporate, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper dilifence upon the part of the master, and, to that end, the master is bound to observe all the care which prudence and exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the servant. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; but it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied and public policy requires that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not the hazard usually or necessarily attendant upon the business, nor is it one which the servant in legal contemplation is presumed to risk.

20.

No. 2. The duty is imposed upon the owner of machinery in use by a servant of his to use ordinary care and prudence (the degree of which must be proportioned to the danger) to have and keep such machinery in a reasonably safe condition. If the agents of the defendant in charge of or having supervision over the trimmer referred to in the complaint knew that it was defective, or if, under all the circumstances, they or any of them, as reasonable men, should have discovered, though they dis not, the defective condition of the trimmer, or if they or any of them negligently remained ignorant of its defective condition, and in consequence of such defective condition the plaintiff received the injury complained of and did not himself contribute towards it, then the law is that the defendant is liable to the plaintiff for the damages occasioned by such injury.

172 21.

No. 3. The master is bound to exercise reasonable care to prevent accidents to his workmen. He is bound to furnish suitable machinery, and see that it is properly protected and kept in proper repair. Machinery is liable from wear and use to get out of repair, and care and watchfulness is due by the master to guard against defects that may arise from use as the nature of the business and the risks incident to it demand; and it is not necessary, in order to entitle a servant to recover for injuries received from defective machinery, that he should show that the master had actual knowledge of such defects. It is enough if he shows that he ought to have known them and might have known them by the exercise of reasonable and proper care on his part in examining and inspecting the appliances.

22.

No. 4. It is neither unjust nor unreasonable that consequences which the servant or workman must have foreseen on entering into an employment and which due care on the part of the employer or master could in no way prevent should not be visited on the latter; but if injuries to servants and workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work, the use of which they could not foresee, there is a different rule. The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and foresight, and if he fails to do so he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible.

The servant has no control over the master. He asts in subordination. He has a right to rely on the judgment of the master that suitable machinery and the needed requirements are supplied. His attention is due to the peculiar duties incident to his branch of the employment. He assumes the risk, more or less hazardous, of the service in which he is engaged; but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation and which might be prevented by ordinary care and precaution on the part of his employer. This rule, however, does not excuse his own neglect in that employment. If he knows or has reason to know that the machinery is defective and has become dangerous to himself by reason thereof, he cannot be allowed to shut his eyes and fold his hands and say, "The master is responsible."

23.

No. 5. Within this rule a servant, in using dangerous and defective machinery, where the danger or defect is not apparent and he has no notice of it, has a right to presume that the master has discharged his duty and that all the appliances of the business are reasonably safe and free from hazard.

173 24.

No. 7. The plaintiff did not have to inquire for latent defects in the trimmer. He has a right to presume that his employer had ascertained them and that if there were any; and in this case the plaintiff had a right to rely on the machinery furnished by the corporation being all that, from his opportunities of observation, it appeared to be, and that it was sufficient for the purposes to which it was applied, and had a right to act in accordance with such presumption, and his so presuming does not constitute negligence on the part of the plaintiff; but if you find from the evidence that he knew or, in the exercise of ordinary care and prudence, ought to have known or could have ascertained that it was unsafe or out of repair, then such presumption does not attach.

25.

No. 8. Where there are any latent defects or hazards incident to the occupation of which the master does or ought to know, it is his duty to warn the servant of that fully, and failing to do so he is liable to him for any injury that the servant may sustain in consequence of such neglect to which he does not contribute by his own neglect.

26.

No. 9. From injuries arising from latent or concealed defects of which the master knew or, in the exercise of reasonable care, ought to have known he is liable, even though the servant knew that the machinery and appliances were in a defective and dangerous condition in some other respects if the injury did not arise from such defects as were known to him. If this machinery is in some respects obviously dangerous, the risk should not be increased by any latent or concealed defects that can be discovered by the exercise of reasonable care.

The primary duty of the servant is obedience, and if, when in the discharge of that duty, he is damaged from the neglect of the master without fault on his own part it is but proper that the master should respond and the servant should be recompensed; and if you find from the evidence that the witnesses Spencer or Smith or any other witness or person on the morning that the plaintiff received the injury complained of told him that he had better look out for himself, that the pulley was liable to come down and he might get hurt, and if you find from the evidence that the plaintiff, by the exercise of reasonable care and diligence, failed or would have failed to discover anything about the pulley or trimmer which indicated the probability of danger in its use, then, as a matter of law, the plaintiff had the right to continue to rely upon the obligation of the defendant to furnish safe and suitable machinery and to warn him against all such defects in the machinery which the agents of the defendant in charge of it knew or could have ascertained by the exercise of reasonable care and diligence, and so relying to proceed with the use of the trimmer according to the terms of his employment; and if he did so he could not be considered guilty of contributory negligence in so doing.

174 27.

No. 12. If you find for the plaintiff you will assess in his favor such sum as damages as in your opinion the evidence before you shows the plaintiff has sustained by the injury, if any proved, and you may take into consideration in arriving at your conclusion compensation for the following—that is to say: 1st, loss of time for plaintiff; 2d, impaired capacity to earn money; 3d, cost of cure; 4th, physical suffering and pain to plaintiff; 5th, mental suffering and anguish directly connected with the bodily injury; 6th, the character of the injury, its permanency or not; and consider these cimply in the light of compensation.

If you find a verdict for plaintiff it will only be for such sum as you find from the evidence will be compensation to him for the injury sustained by and through defendant's neglect; and if the injury of the plaintiff resulted from negligence of which he is without fault, then he is entitled to recover of defendant all damages directly resulting from such negligence. If you believe from the evidence that the plaintiff at the time of receiving such injury was affected with organic disease of the heart, and that his present condition is owing in part or largely to such disease, still, if you should further find from the evidence that the injury materially contributed to bring about plaintiff's present condition of health, or that if it had not been for such injury the plaintiff would not now be disabled or incapable of performing work, then the fact that plaintiff was affected with organic disease of the heart at the time he received the injury should not affect his right to recover of the defendant for all damages, if any, occasioned by defendant's negligence; and defendant should not be compelled to pay for any greater injury than the evidence shows to you and satisfies you it has occasioned.

28.

GENTLEMEN: In a general way, then, and as a general charge, I instruct you to lay aside any feeling of passion or prejudice that may exist and examine this case upon the evidence here before you calmly, dispassionately, without sympathy or emotion, and let your verdict be the truth, as a verdict ought to be in this and in all cases.

I instruct you that an employer is not bound to furnish for the use of his employee the best possible instruments and machinery, but he is bound to furnish such instruments and machinery as are reasonably safe for the use to which they are applied, and the employee is not bound to use the utmost care and diligence in the service of the employer or in the use of the machinery furnished to him by his employer, but only reasonable care and diligence; nor is either presumed to know all possible dangers incident to the employment or the machinery furnished or used; neither is the employer presumed to warrant the employee against accident arising from the use of the machinery or the dangers incident to the business.

175 Each has a right to trust to the other and to rely upon the other for and to expect the exercise of reasonable care, prudence, and dilifence, that ordinary care and prudence, as well as diligence, which a reasonably prudent, diligent, and careful man would exercise in the business and under the circumstances incident to, accompanying, and surrounding it.

29.

The employee, by accepting the employment, assumes the ordinary risks of the business he engages in, and has a right to assume that the machinery and instruments furnished by the employer are reasonably safe for the purposes and business to which he is engaged. He is not presumed to know hidden defects in the machinery—such defects as are not apparent to him and do not become manifest in the ordinary use of it in the business in which he uses it and is expected to use it. He may know them, and if he does he is bound by the knowledge, but there is no presumption of such knowledge in the absence of proof. He has a right to assume and to act upon the assumption that if there is some hidden defect or secret fault in the machinery known to his employer, but not apparent and not manifesting or presenting itself to his observation by the use, care, and management of the thing itself in the business, that the employer will notify him of such fault or defect in order that he may be on his guard or refuse the extraordinary risk, if there be one, arising from such defect or fault.

30.

If the employee knows of a defect or fault in the machinery of which the employer is ignorant he is under the same obligation to notify his employer, and if he does not do so, and continues to use it in its defective condition, he does it at his own risk, and no blame can attach to the employer if injury thereby results to the person employed.

31.

If the machinery is reasonably safe, and in or by its use, or for any reason, it becomes unsafe or defective or out of repair and the employee knows the fact, it is his duty and the employer has a right to rely upon him that he will give notice of the fact in order that it may be repaired and made safe; and if he does not give the notice, and injury results to himself from its unsafe condition, he is in fault himself, and the law leaves him to bear the burden. This is but common honesty.

32.

If the employer is negligent in the matter and the employee is also negligent, and the injury results partly from the negligence of each, the law does not attempt to apportion the loss between them. There is no certain rule by which it can be done if it was attempted; consequently the rule is established, and if it is right and just that if the negligence of the employee contributes to the injury he receives he cannot recover of the employer for that injury.

176 33.

It is claimed in this case, and you will judge of the evidence on that subject, that this machine had been in long and continuous use. Long-continued use of a machine in a business without injury or accident is very strong evidence that it is reasonably safe for use in that business by persons possessing the knowledge and experience requisite to its use, and any person engaging in its use voluntarily is presumed to have some knowledge and experience; but if such machine is, in fact, defective in its construction, and such defect is a hidden or secret one, he is not presumed to have notice of it. But he is to be charged with such notice if, from the use of it, including such management and care of it as he is shown to have had of it, he would necessarily or naturally or reasonably be presumed to arrive at a knowledge of such defect. He is also to be charged with notice of it if he had actual knowledge of it or had a notice or warning from any person which, if pursued in the manner a careful and prudent man under the circumstances ought to have pursued it, would have led him to the knowledge of it.

34.

It results from what I have said that an employer is not in any sense an insurer of his employee against injury resulting from his own neglect, but is responsible for an injury resulting to the servant from the negligence of the master to which the neglect of the servant did not contribute.

The acts of the defendant's agents in charge of this mill, who manage and control it for defendant, are the acts of the defendant.

35.

You should not allow sympathy for plaintiff to sway you or have any influence upon your minds in this case; nor should any consideration of the fact, or any supposition, that defendant is able to pay damages and plaintiff may be poor or unfortunate, have any consideration whatever.

36.

The parties are entitled to equal and exact justice at your hands, and stand on a level here to be judged by the evidence and the law. Aside from all other considerations, you are to find the facts from the evidence alone.

37.

If you find a verdict for the plaintiff you will return a verdict in the form which I will give you. After the title it reads as follows: "We, the jury in this case, find for plaintiff, and assess the damages at —— dollars." You will find in that sum, and one of your number will sign as foreman. If you find a verdict for the defendant you will sign this other one: "We, the jury in this action, find a verdict for defendant," and one of your number will sign that.

177 And the jury, after being so instructed by the court, retired, in charge of a sworn officer, to deliberate, and afterwards returned into court and rendered the following verdict, viz:

In the District Court, Holding Terms at Seattle, W. T.

W. C. HAWTHORNE, Plaintiff,
vs.
COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Defendant.

We, the jury in this action, find a verdict for the plaintiff and assess his damages in the sum of ten thousand dollars ($10,000).

H. HUMMEL, *Foreman.*

And at the time said verdict was received by the court the defendant, by its attorney, in open court, gave notice of a motion for a new trial and in arrest of judgment, and at the same time, in open court, the plaintiff, by his attorney, J. C. Haines, Esq., and the defendant, by its attorney, James McNaught, Esq., stipulated that the defendant have until the 14th day of July, 1887, within which to file its motion for a new trial; that said defendant have until that time to except to such portions of the instructions as it may see fit; that said exceptions when made shall be considered as having been made and allowed by the court immediately after the giving of said instructions and the retiring of the jury in said cause and before the rendition of their verdict therein, and that the cause be set for hearing upon said motion for a new trial on the 14th day of July, 1887, at the hour of two o'clock in the afternoon.

And thereupon, pursuant to said stipulation, the court made the following order, viz:

The parties having so stipulated, it is ordered that the defendant have until the 14th day of July, 1887, within which to file its motion for a new trial; that said defendant have until that time to except to such portions of the instructions as it may see fit; that said exceptions when made shall be considered as having been made after the giving of said instructions and the retiring of the jury in said cause and before the rendition of their verdict therein; and it is further ordered by the court that said motion for a new trial be, and the same is hereby, set for hearing on the 14th day of July, 1887, at the hour of 2 o'clock in the afternoon.

And afterwards the motion and affidavit for a new trial and exceptions to the instructions given by the court to the jury were filed on the dates appearing by the endorsements thereon; of which motion, affidavit, and exceptions, with the endorsements thereon respectively, the following are copies, viz:

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle, King County, W. T.

W. C. HAWTHORNE, Plaintiff,
vs.
178 COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Defendant.

Now comes the defendant and moves the court to vacate and set aside the judgment and verdict rendered and entered in the above-entitled cause and grant a new trial therein, for the reasons and upon the grounds following:

I.

In admitting, over the objections of the defendants duly made, testimony as follows:

II.

1. Admitting evidence concerning the physical condition and ability of the plaintiff to earn money and as to his occupation or trade prior to the accident or injury complained of, as shown on pages 6 and 23 of the stenographer's report of the testimony.
2. Admitting of testimony showing a change made in the trimmer or machine in question after the accident, as set forth on pages 8 and 9 of the stenographer's report of the testimony.
3. Admitting testimony of conversations between witnesses and persons not in the employ of the company at the time of the accident or trial, as shown on page 24 of the stenographer's report of the testimony.
4. Admitting the testimony of William Morris, as an expert, as to whether the machinery was safe or not, when it was shown by the testimony of said Morris that he was neither a mechanic or machinist. See page 30 of the stenographer's report of the testimony.
5. Letting Mrs. Hawthorne, wife of plaintiff, testify over the objections of the defendant without the consent of the plaintiff, as shown on page 57 of said stenographer's report of the testimony.

III.

The court erred in not sustaining defendant's motion for a nonsuit.

1. It appears from the testimony of the plaintiff, on page 63 of the reporter's notes, that the plaintiff did not understand anything about running a trimmer.

That he did not possess a fair measure of skill for the service he undertook to perform, and that he did not inform himself at the outset or at all of the duties and dangers peculiar to his work.

2. It does not appear from the plaintiff's own testimony that the machinery he undertook to run was different from anything he had ever seen before, and that he was informed, prior to and at the time of the accident, — knew that it was in a dangerous and unsafe condition, because the same had not been properly babbitted and oiled.
3. It does not appear from the testimony of and on behalf of the plaintiff that the defendant was negligent in providing unsafe machinery.

179 4. It does not appear from the said testimony that if said machine was unsafe that the defendant was negligent in not knowing it or that the defendant knew it.

III.

Error of the court in assuming and admitting testimony upon the assumption that the plaintiff at the time had proven that the machinery in question was defective and insecure, as shown on page- 8 and 9 of the stenographer's report of the testimony.

IV.

Error of the court in refusing instructions asked for by the defendant as follows:

1. Instruction No. 7.
2. Instruction No. 8.
3. Instruction No. 9.
4. Instruction No. 10.
   Instruction No. 11.
6. Instruction No. 16.
7. Instruction No. 18.
8. Instruction No. 19.
9. Instruction No. 26.

V.

The court erred in giving the following instructions asked for by the plaintiff:

1. Instruction No. 3, in this: The defendant is not bound to provide against seen dangers. Also the instruction should have been qualified as to the negligence of the plaintiff contributing to the injury.

2. The court erred in giving the fourth instruction asked for by the plaintiff. The language therein as follows: "And if he fails to do so he is guilty of a breach of duty under his contract, for the consequence of which in justice and sound reason he ought to be responsible," should have been qualified and confined to defects discoverable by the exercise of ordinary care and caution, and not so discoverable and known to plaintiff.

3. In giving the 7th instruction asked for by the plaintiff. The plaintiff had no right to presume that the defendant had ascertained latent defects, but the plaintiff had the right to presume that the defendant had used reasonable care and diligence to ascertain latent defects.

4. The court erred in giving the 9th instruction asked for by the plaintiff in this: Said instruction should have been qualified by adding, after the words "if the injury did not arise from such defects as were known to them," the words: And the defects known to the plaintiff did not in any degree contribute to the injury.

VI.

That the verdict is not sustained by and is contrary to the evidence.

180

VII.

That the damages are excessive.

VIII.

Misconduct of the jury in examining the machinery during the progress of the trial without the knowledge of or under the direction of the court, said last ground of said motion being based on the affidavit of F. M. Dudley filed herein.

McNAUGHT, FERRY, McNAUGHT AND DUDLEY,
Attorneys for Defendant.

Endorsements: No. 5017. In the district court, 3d judicial district, holding terms at Seattle, Washington Territory. William C. Hawthorne, plaintiff, *vs.* C. & P. S. R. R. Co., defendant. Motion for a new trial. Filed Jul-13, 1887. James Seavey, clerk, by W. E. Ledgerwood, deputy clerk. McNaught, Ferry, McNaught & Dudley, attorneys for defendant. Received copy of the within motion for a new trial this 13th day of July, 1887. S., H. & M., attorneys for pl't'ff.

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle, King County, Washington Territory.

WILLARD C. HAWTHORNE, Plaintiff,
vs.
COLUMBIA & PUGET SOUND RAILROAD COMPANY, Defendant.

TERRITORY OF WASHINGTON, } *ss:*
County of King,

F. M. Dudley, being first duly sworn, on oath deposes and says that he is a citizen of the United States over the age of 21 years; that on the — day of July, A. D. 1887, he was informed by 181 one of said jurors in the above-entitled cause that he, said juror, understood and believed that several of the said jurors had, during the progress of the trial of said cause, visited the said saw-mill of said defendant, described in the complaint filed in said action, and had there examined the trimmer run and operated by said plaintiff, Willard C. Hawthorne, at the time of receiving the injury complained of in said complaint; that on the — day of July, 1887, and subsequent to the time of receiving said information, affiant was informed by E. C. Stonebreaker, one of said jurors, that he, said Stonebreaker, had, during the progress of the trial of said cause, visited said saw-mill and examined said trimmer. Affiant also believes and therefore avers the fact to be that said Stonebreaker did so visit and examine said trimmer. Affiant also believes and therefore avers that other members of said jury did, during the progress of said trial, visit and examine said trimmer, and that the verdict rendered by said jury was influenced by such examination.

F. M. DUDLEY.

Subscribed and sworn to before me this 13th day of July, A. D. 1887.

A. C. BOWMAN,
Notary Public.

Endorsements: No. 5017. In the district court, 3d judicial district, holding terms at Seattle, Washington Territory. Willard C. Hawthorne, plaintiff, *vs.* C. & P. S. R. R. Co., defendant. Affidavit of F. M. Dudley. Filed Jul- 13, 1887. James Seavey, clerk, by W. E. Ledgerwood, deputy clerk. McNaught, Ferry, McNaught & Dudley, attorneys for def't.

In the District Court of the Third Judicial District of Washington Territory, Holding Terms at Seattle, King County, W. T.

WILLARD C. HAWTHORNE, Plaintiff,
vs.
COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Defendant.

182 Now comes said defendant, by its attorneys, McNaught, Ferry, McNaught & Dudley, and excepts to the refusal of the court to give the following instructions asked for by the defendant, and each and every one thereof:

1. Instruction No. 7.
2. Instruction No. 8.
3. Instruction No. 9.
4. Instruction No. 10.
5. Instruction No. 11.
6. Instruction No. 16.
7. Instruction No. 18.
8. Instruction No. 19.
9. Instruction No. 26.

II.

Defendant excepts to each and every of the following instructions asked for by the plaintiff and given by the court:

1. Instruction No. 3, in this: The defendant is not bound to provide against seen dangers; also the instructions should have been qualified as to the negligence of the plaintiff contributing to the injury.
2. Instruction No. 4. The language therein as follows: "And if he fails to do so he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible," should have been qualified and confined to defects discoverable by the exercise of ordinary care and caution, and not so discoverable or known to plaintiff.
3. Instruction No. 7: The plaintiff had no right to presume that the defendant had ascertained latent defects; but the plaintiff had the right to presume that the defendant had used reasonable care and diligence in ascertaining latent defects.
4. Instruction No. 9: Said instruction should have been qualified

by adding after the words "if the injury did not arise from such defects as were known to them" the words "and the defects known to the plaintiff did not in any degree contribute to the injury."

McNAUGHT, FERRY, McNAUGHT & DUDLEY,
Attorneys for Defendant.

Endorsements: No. 5017. In the district court, 3d judicial district, holding terms at Seattle, Washington Territory. Willard
C. Hawthorne, plaintiff, *vs.* C. & P. S. R. R. Co., defendant. Ex-
183 ceptions to instructions. Filed Jul- 14, 1887. James Seavey,
clerk, by W. E. Ledgerwood, deputy clerk. McNaught, Ferry,
McNaught & Dudley, attorneys for def't.

And afterwards, on the 21st day of October, 1887, said cause came on for hearing before the court upon said motion for a new trial, the parties having respectively consented to the hearing of said motion at this time, and, no objections to said hearing being now made and after hearing said motion and the arguments of counsel for both parties, the court denied said motion; to which ruling of the court in denying said motion the defendant, by its attorney, C. H. Hanford, at the time excepted, and its exception was allowed by the court.

And now, on this 18th day of November, 1887, in open court, the defendant, by its attorney, C. H. Hanford, presents this statement and asks the court to settle and allow the same, as and for the statement of facts in this cause, to be used on appeal to the supreme court of this Territory; and now the plaintiff, by his attorney, J. C. Haines, objects to said statement on the ground that the same is not a true statement and does not contain all the material facts, for that the argument of Jas. H. McNaught, att'y for the defendant, upon the trial is omitted therefrom; and now the court directs said attorney for the plaintiff to produce said omitted matter to be incorporated into said statement, but said attorney declines for the reason that he is unable to produce said matter, no report of said argument having been preserved; and thereupon the court overruled said objection; to which ruling of the court plaintiff excepts, and his exception is allowed by the court; and now said attorney for the plaintiff moves the court to strike out of said statement the argument of the plaintiff's attorney upon the trial, and the court denies said motion; to which ruling of the court in denying said motion the plaintiff excepts, and his exception is allowed by the court.

184 TERRITORY OF WASHINGTON, }
County of King. }

In the District Court of the Third Judicial District, Holding Terms at Seattle.

WILLARD C. HAWTHORNE, Plaintiff, *vs.* THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Defendant.	No. 5017. Certificate.

And now, on this eighteenth day of November, 1887, within thirty days after the rendition of the judgment herein, and pursuant to legal notice duly served upon J. C. Haines, Esq., attorney for the plaintiff, this cause comes on to be heard upon the defendant's motion to settle a statement of the facts to be certified to the supreme court upon appeal, the plaintiff being present by his attorney, J. C. Haines, Esq., and the defendant also present by its attorney, C. H. Hanford, Esq.

And now, upon due consideration, I, Richard A. Jones, judge of the said district court, before whom said cause was tried, find and do hereby certify that the annexed and foregoing pages, numbered from 1 to 201 in red ink, is a full, true, and correct statement of the facts in said cause, and that said statement contains all the evidence introduced and all of the instructions given by the court to the jury upon the trial of said cause, and all of the material facts in said cause; and the same is now settled and signed by me as and for a statement of facts in said cause.

R. A. JONES, *Judge.*

184½ [Endorsed:] Willard C. Hawthorne, plaintiff, *vs.* Columbia & Puget Sound R. R. Co., defendant. No. 5017. Filed Nov. 18, 1887 W. E. Ledgerwood, clerk.

185 Journal O, page 79.

FRIDAY, *November 18th*, 1887.

WILLARD C. HAWTHORNE *vs.* COLUMBIA & PUGET SOUND RAILROAD COMPANY.	No. 5017. Appeal.

And now, on this 18th day of November, 1887, in open court, the plaintiff being present by his attorney, J. C. Haines, Esq., and the defendant being also present by its attorney, C. H. Hanford, Esq., said defendant appeals this cause to the supreme court of Washington Territory and gives notice of its said appeal, and the court allows said appeal and orders that said notice of appeal be entered in the Journal.

TERRITORY OF WASHINGTON,
County of King.

In the District Court of the Third Judicial District, Holding Terms at Seattle.

WILLARD C. HAWTHORNE, Plaintiff,
vs.
THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Defendant.
No. 5017. Supersedeas Bond.

Know all men by these presents that we, The Columbia and Puget Sound Railroad Company, the defendant in the above-entitled cause, as principal, and A. A. Denny and Bailey Gatzert, as sureties, are held and firmly bound unto Willard C. Hawthorne, the plaintiff in said cause, in the sum of twenty-one thousand dollars, lawful money of the United States of America; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the thirtieth day of November, A. D. 1887.

The condition of the above obligation is such that whereas a judgment was rendered in the above-entitled cause in the above-entitled court on the 21st day of October, 1887, in favor of the above-named plaintiff and against said defendant for the sum of ten thousand dollars and costs, and said defendant has taken an appeal from said judgment to the supreme court of Washington Territory, and has claimed a stay of proceedings on said judgment:

Now, therefore, if said defendant, The Columbia and Puget Sound
Railroad Company, shall pay to the said plaintiff, Willard
186 C. Hawthorne, all costs and damages that shall be adjudged
against said defendant on said appeal, and also will satisfy and perform the judgment appealed from in case it shall be affirmed and any judgment or order which the said supreme court may render or order to be rendered by the said district court, not exceeding in amount or value said original judgment, then these presents shall be void; otherwise of full force and effect.

COLUMBIA AND PUGET SOUND
RAILROAD COMPANY,
[CORPORATE SEAL.] By A. A. DENNY, *Vice-President,*
And T. H. TYNDALE, *Secretary.*
A. A. DENNY. [SEAL.]
BAILEY GATZERT. [SEAL.]

TERRITORY OF WASHINGTON, } *ss:*
County of King,

A. A. Denny and Bailey Gatzert, being first duly sworn, says that he is one of the sureties named in the foregoing obligation; that he is a resident of King county, Washington Territory, and is worth the sum of twenty-one thousand dollars over and above all his debts and liabilities and exclusive of property exempt from execution.

A. A. DENNY.
BAILEY GATZERT.

Subscribed and sworn to before me this second day of December, 1887.

R. M. HOPKINS,
[SEAL.] *Notary Public.*

Endorsements: No. 5017. In the district court, third judicial district, holding terms at Seattle. Willard C. Hawthorne, plaintiff, *vs.* Columbia and Puget Sound Railroad Co. Supersedeas bond. Approved and filed this 2d day of Dec., 1887. W. E. Ledgerwood, clerk, by H. T. Hannon, deputy clerk. Greene, McNaught, Hanford & McGraw, attorneys for def't.

187 TERRITORY OF WASHINGTON, }
County of King. }

In the District Court of the Third Judicial District, Holding Terms at Seattle.

WILLARD C. HAWTHORNE, Plaintiff,
vs.
THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Defendant.
} No. 5017. Assignment of Errors.

Comes now the defendant in the above-entitled action and makes the following assignment of errors therein:

I.

The court erred in admitting in evidence upon the trial, over the defendant's objection thereto, the testimony given by the witnesses A. L. Spencer and A. P. Spaulding as to the physical condition of the plaintiff prior to the time of the injury alleged in the complaint, which testimony is found on pages 6, 7, and 24 of the statement herein.

II.

The court erred in admitting in evidence upon the trial, over the defendant's objection thereto, the testimony of the witness A. L. Spencer in regard to the change made in the machinery of defendant's saw-mill after the injury to the plaintiff, alleged in his complaint, which testimony is found on page 9 of the statement herein.

III.

The court erred in admitting in evidence upon the trial, over the defendant's objection thereto, the testimony of the witness A. P. Spaulding in regard to the conversations had with Mr. Weymouth while acting as superintendent of the defendant's saw-mill prior to the time of the injury alleged in plaintiff's complaint, which testimony is found on pages 24 and 25 of the statement herein.

IV.

The court erred in admitting in evidence upon the trial, over the defendant's objection thereto, the testimony of the witness William Morris in answer to the following questions propounded by plaintiff's attorney: "Would you consider it safe in machinery of this kind to put a cap on having a thread cut so that as the pulley turned ahead the nut would turn off the thread?" Which testimony is found on page 31 of the statement herein.

V.

The court erred in admitting upon the trial, over defendant's objection thereto, the testimony given by the plaintiff's wife, and erred in permitting plaintiff's wife to be sworn as a witness in said cause without the consent of the plaintiff.

188

VI.

The court erred in not sustaining defendant's motion for a nonsuit; and the defendant now relies upon the following grounds for said motion:

A. It appears from the testimony of the plaintiff that the plaintiff did not understand the construction of the machine he was employed to operate in the defendant's saw-mill, and was not competent to operate the same; that he did not possess in a full measure skill for the services he undertook to perform, and that he did not inform himself at the outset, or at all, of his duties in operating and taking care of said machine, or the dangers peculiar to his work, and that he did not use reasonable care in keeping said machinery in order and did not use reasonable care to avoid the dangers incident to his employment.

B. It does appear from the testimony introduced by the plaintiff that the machinery that he undertook to run was different in construction from anything that he had ever seen before, and that he was informed prior to and on the day of the accident knew or should have known that it was in a dangerous and unsafe condition.

C. It does not appear from the testimony of the plaintiff that the defendant was negligent in providing unsafe machinery, or that the injury to the plaintiff was caused by defendant's negligence.

D. It does not appear from the testimony on the part of the plaintiff that the defendant, at or previous to the time of the injury to the plaintiff, knew that the machinery in the saw-mill, or any part of it, was imperfect or out of order or in an unsafe condition, or that the defendant was negligent in nit knowing it.

VII.

The court erred in making the following announcement in the hearing of the jury upon the trial, to wit: "The rule is quite well settled, I think, Mr. McNaught, that where an accident occurs through defective machinery or defective fixtures or the machine itself, if that is shown to be true, then a change, repair, or substitution of something else for the defective machinery is admissible as showing or tending to show the fact. I think that is quite well settled." In this, that all of said announcement the court assumed, contrary to the fact that the plaintiff at that time had proven that the machinery in question was defective and unsafe.

VIII.

The court erred in refusing to give the instruction to the jury asked for by defendant numbered 7.

IX.

The court erred in refusing to give the instruction to the jury asked for by the defendant numbered 8.

X.

The court erred in refusing to give the instruction to the jury asked for by the defendant numbered 9.

189

XI.

The court erred in refusing to give the instruction to the jury asked for by the defendant numbered 10.

XII.

The court erred in refusing to give the instruction to the jury asked for by the defendant numbered 11.

XIII.

The court erred in refusing to give the instruction to the jury asked for by the defendant numbered 16.

XIV.

The court erred in refusing to give the instruction to the jury asked for by the defendant numbered 18.

XV.

The court erred in refusing to give the instruction to the jury asked for by the defendant numbered 19.

XVI.

The court erred in refusing to give the instruction to the jury asked for by the defendant numbered 26.

XVII.

The court erred in giving the following instructions to the jury, to wit: "The master is bound to exercise reasonable care to prevent accident to his workmen. He is bound to furnish suitable machinery, and see that it is properly protected and kept in proper repair. Machinery is liable from wear and use to get out of repair, and care and watchfulness is due by the master to guard against defects that may arise from use as the nature of the business and the risk incident to it demand; and it is not necessary, in order to entitle a servant to recover for injuries received from defective machinery, that he should show that the master had actual knowledge of such defects. It is enough if he shows that he ought to have known them and might have known them by the exercise of reasonable and proper care on his part in examining and inspecting the appliances."

XVIII.

The court erred in giving the following instructions to the jury, to wit: "It is neither unjust nor unreasonable that consequences that the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in any way prevent, should not be visited on the latter. But if injuries to servants and workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work, the use of which they could not see, there is a different rule. The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable
care and foresight; and if he fails to do so, he is guilty of a
190 breach of duty under his contract, for the consequence of
which, in justice and sound reason, he ought to be responsible.

The servant has no control over the master. He acts in subordination. He has a right to rely on the judgment of the master that suitable machinery and the needed requirements are supplied. His attention is due to the peculiar duties incident to his branch of the employment. He assumes the risk, more or less hazardous, of the service in which he is engaged, but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation and which might be prevented by ordinary care and precaution on the part of his employer. This rule, however, does not excuse his own neglect in that employment. If he knows or has reason to know that the machinery is defective and has become dangerous to himself by reason thereof he cannot be allowed to shut his eyes and fold his hands and say, 'The master is responsible.'"

XIX.

The court erred in giving the following instruction to the jury, to wit: "The plaintiff did not have to inquire for latent defects in the trimmer. He has a right to presume that his employer had ascertained them and *then* if there were any, and in this case the plaintiff had a right to rely on the machinery furnished by the corporation being all that, from his opportunities of observation, it appeared to be, and that it was sufficient for the purpose to which it was applied, and had a right to act in accordance with such presumption, and his so presuming does not constitute negligence on the part of the plaintiff. But if you find from the evidence that he knew or in the exercise of ordinary care and prudence ought to have known or could have ascertained that it was unsafe or out of repair, then such presumption does not attach."

XX.

The court erred in giving the following instruction to the jury, to wit: "For injuries arising from latent or concealed defects of which the master knew or in the exercise of reasonable care ought to have known he is liable, even though the servant knew that the machinery and appliances were in a defective and dangerous condition in some other respect, if the injury did not arise from such defects as were known to him. If this machinery is in some respects obviously dangerous, the risk should not be increased by any latent or concealed defects that can be discovered by the exercise of reasonable care.

The primary duty of the servant is obedience, and if when in the discharge of that duty he is damaged from the neglect of the master without fault on his own part it is but proper that the master should respond and the servant should be recompensed; and if you find from the evidence that the witnesses Spencer or Smith or any other witness or person, on the morning that the plaintiff received the injury complained of, told him that he had better look
191 out for himself, that the pulley was liable to come down and he might get hurt, and if you find from the evidence that the plaintiff, by the exercise of reasonable care and diligence, failed or would have failed to discover anything about the pulley or trimmer which indicated the probability of danger in its use, then as a matter of law the plaintiff had the right to continue to rely upon the obligation of the defendant to furnish safe and suitable machinery, and to warn him against all such defects in the machinery which the agents of the defendant in charge of it knew or could have ascertained by the exercise of reasonable care and diligence, and, so relying, to proceed with the use of the trimmer according to the terms of his employment; and if he did so do, he could not be considered guilty of contributory negligence in so doing."

XXI.

The court erred in permitting the plaintiff's attorney, in his closing argument to the jury on the trial, to make the following improper statements and comments without instructing said attorney to desist from such conduct and without instructing the jury in regard to the same, viz: "When the accident occurred, according to the statement of Mr. Spaulding—and I have it here that Mr. Hawthorne told him that after the accident he went down and examined that pulley and examined the shaft and found how it was the injury had happened, and discovered that it was not oiled and the pulley slipped off.

What are the facts in regard to the matter? Consider them. Mr. Hawthorne for four weeks could never leave his bed, and for six weeks he could not walk, and yet, according to Spaulding's testimony, on the day probably of the injury, he went down to the mill and examined the pulley, when he was probably unconscious, and found that the injury had occurred by reason of its not having been oiled. Now, that is Spaulding's testimony, the testimony which the evidence and the conceded facts show is an absolute falsehood. The idea that Mr. Hawthorne six weeks or a month after should walk down to the mill and examine the shaft to ascertain how the accident occurred after they had been running this trimmer constantly in the mill for over a month, and that he then found how the injury had been received. So, if Mr. Hawthorne had never opened his lips in regard to this conversation as claimed by Spaulding, it would not make any difference, because the fact is absolutely absurd on its face; and it shows to what extent the defense in this case has been driven to delay this cause until the injuries of the plaintiff have become so confirmed and so severe that it will be impossible for him to appear in court and testify before a jury of his fellow-men. * * * Now take Plummer's testimony. This is one of the disinterested witnesses who *was* always on hand on occasions of this kind against corporations. They have always got a lot of disinterested witnesses who can come in here and outswear any poor man who happens to be injured through their negligence."

XXII.

192 The court erred in overruling the defendant's motion for a new trial; and the defendant now relies on each and every of the grounds in said motion stated therein.

XXIII.

The court erred in rendering judgment for the plaintiff.

XXIV.

The court erred in not rendering a judgment for the defendant.

GREENE, McNAUGHT, HANFORD & McGRAW,
Attorneys for the Defendant.

We hereby admit that we have received a copy of the foregoing assignment of errors at the county of King, W. T., this 2d day of December, 1887.

STRUVE, HAINES & McMICKEN,
Attorneys for Plaintiff.

Endorsements: No. 5017. In the district court, third judicial district, holding terms at Seattle. Willard C. Hawthorne, plaintiff, *vs.* C. & P. S. R. R. Co., defendant. Assignment of errors. Filed this 2nd day of Dec., 1887. W. E. Ledgerwood, clerk, by H. T. Hannon, deputy clerk. Greene, McNaught, Hanford & McGraw, attorneys for defendant.

193 TERRITORY OF WASHINGTON, } *ss:*
Third Judicial District, }

I, W. E. Ledgerwood, clerk of the district court of the third judicial district of Washington Territory, holding terms at Seattle, in King county, for the counties of King and Kitsap, do hereby certify that the foregoing is a full, true, and correct transcript of so much of the record in the above-entitled cause as I am by statute required on writ of error to transmit to the Supreme Court.

In testimony whereof I have hereunto set my hand and the seal of said district court this — day of December, 1887.

[SEAL DIST. C'T.] —— ——, *Clerk.*

193½ Proceedings of the supreme court of Washington Territory follow after this sheet.

194 Original.

THE UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States, of the October Term, A. D. 1888.

THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY }
vs. } In Error.
WILLARD C. HAWTHORNE. }

The President of the United States to the justices of the supreme court of the Territory of Washington, Greeting:

Because in the records and in the proceedings and also in the rendition of the judgment of a plea which is in said supreme court of the Territory of Washington, before you, between The Columbia and Puget Sound Railroad Company, plaintiff, and Willard C. Hawthorne, defendant, in error, a manifest error hath happened, to the great damage of the said The Columbia and Puget Sound Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the partie- aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, togother with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

195 Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this twenty-third day of January, one thousand eight hundred and eighty-eight.

Seal Supreme Court, Washington Territory.

R. G. O'BRIEN,
Clerk of the Supreme Court of the Territory of Washington.

ROGER S. GREENE &
C. H. HANFORD,
Attorneys for Plaintiff in Error.

[Endorsed:] In the Supreme Court of United States. Columbia & Puget Sound R. R. *vs.* Willard C. Hawthorne. Writ of error. Returned and filed this day of Jan. 24, A. D. 1888. R. G. O'Brien, clerk.

196 THE UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States, of the October Term. A. D. 1888.

THE COLUMBIA & PUGET SOUND RAILROAD COMPANY, Appellants,
vs.
WILLARD C. HAWTHORNE, Appellee.
} In Error.

Return.

The answer of Richard A. Jones, chief justice of the supreme court of the Territory of Washington, to the foregoing writ, the record and process whereof mention is therein made, follow in these words, to wit:

197 In the Supreme Court of Washington Territory.

COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Appellant,
vs.
WILLARD C. HAWTHORN, Appellee.
} Appeal from Third District, at Seattle.

Opinion, Rendered January 16, 1888.

By LANGFORD, *J.:*

In this case the appellee brought his action against the appellant to recover $15,000 for an injury received by the appellee from the fall of a pulley from the machine of appellant upon the appellee.

The said machine was what is known as a trimmer in appellant's saw-mill.

Appellee was employed by appellant to operate this machine, and while operating it received the injury.

Appellee claims that the accident was caused by a latent defect in the machine, without fault upon his part.

Appellant claims that there was no real defect in the machine, but that the accident was caused by want of care and skill upon the part of appellee.

A jury trial was had, and before the case was submitted to the
jury appellant moved that the court would take the case from
198 the jury and enter a judgment against the appellee for costs,
and, after the verdict, moved the court to set aside the verdict
and grant a new trial.

Both motions were made upon the same ground, to wit, that the evidence would not support a verdict for the appellee.

During the trial exceptions were taken by the appellant to the admission of certain evidence, to arguments of appellee's counsel, and to the giving and refusing of certain instructions.

We will first consider the motions of nonsuit and for new trial and the rulings thereon.

The inxury was caused by the fall of a heavy iron pulley.

This fall was caused by the wheel becoming somewhat looser than usual upon the shaft, and thus impinging upon the cap or nut which was on the end of the shaft, causing said nut to unscrew and come off and thereby let the pulley fall.

The pulley, it is claimed, became loose and impinged upon the nut or cap because the shaft was not properly oiled by appellee.

The pulley in this particular machine turned in such a way that
when it turned it impinged against the nut and unscrewed it. The
only proper way to have the nut screwed on is so that the friction
would tighten the nut, and this is the only reasonable and safe way
to put on the cap or nut. Had this machine been thus con-
199 structed the loosening of the pulley could not have caused the
accident.

The dangerous condition of this nut, upon account of its malconstruction, was such that no man running the machine with ordinary skill and care could have discovered this defect, and this defect was utterly unknown to appellee.

The appellant claims that appellee, by not oiling the machine, caused the pulley to work too loosely on the shaft, and that this was appellee's fault.

There is a conflict of evidence as to whether appellee did properly oil the machine, and it is difficult to determine where the preponderance lies. There is a conflict of testimony as to whether appellee had notice that the machine was dangerous; but there is no evidence that the looseness of the pulley would have caused the nut to work off, and hence the pulley to fall, if the machine had been of the ordinary or proper construction. The proof is positive that with a proper construction there would have been no danger of the pulley falling, even if it were as loose as alleged.

The notice claimed to have been given to appellee was not notice of the wrongful manner in which the nut was put on.

It is concluded that no skill or care could have informed appellee of the real and only danger resulting from the improper cap, and the defect from which alone the accident happened. No particular

skill is shown to be required to run a trimmer, and it is not
200 shown that appellee had not such skill or care as was necessary. If it were, no skill or care could have *prevented* the defendant from the nut coming off, and hence the pulley falling and the consequent injury.

The defective manner of fastening on the nut was the sole cause of the danger and accident. This danger was well known to the appellant when it set appellee at work, and could not have been nor was it known to the appellee.

The jury would have entirely failed in their duty not to have found a verdict for the Llaintiff under this evidence, and the court committed no error in submitting the case to them and entering a judgment upon the verdict.

As to the verdict of $10,000 being excessive, we do not think it is, as defendant is entirely deprived of health and ability to labor for life.

As to the exception to the argument of counsel, we think it not well taken. Much latitude is allowed to counsel, and, so far as the record shows, we know not whether it was not a proper retaliation for improper arguments of the counsel for the appellants. However this may be, after the words were uttered the court could do nothing of service except to give the jury instructions as to how they should consider the remarks; yet appellants requested no instruction on the point.

The complaint alleges that the appellee by the injury is deprived of the ability to follow his business or work or provide for his family. Being deprived of those things implies that he had
201 them and would have had them in the future, for to be deprived of by the injury can mean no less than that appellee had them before deprived.

What was the peculiar kind of work or business of which he was thus deprived is not stated, but the allegation gave notice that he intended to prove some particular kind, and, if the appellant was satisfied to go to trial upon this general notice, he ought not to complain at the trial. If not satisfied by the description he might have had it made more definite on motion or he could have had a bill of particulars. Not moving for this, he waived indefiniteness.

Appellant made objections to the admission of evidence that after the accident the appellant put plank under the pulley so as to arrest its fall if it should come off in the future.

Acts and words of a party which expressly or impliedly are admission against interest are admissible. The putting of plank to stop the falling pulley is a declaration that the pulley is liable to fall, for the plank *are* useless for any other purpose. If the change of the situation by appellant might have been made for an entirely different purpose the rule might be different.

William Morris had run a trimmer for some time. The evidence does not show that it requires any particular science or skill to run one or that it requires a machinest to do it. His testimony was properly admitted.

202 Appellee called his wife to the witness stand, caused her to be sworn to testify to the truth, the whole truth, and nothing but the truth in the case, and after her oath asked her questions. We think a more emphatic consent by the husband that she might testify is hardly possible.

Objection is made that modifications were not given to certain numbered instructions. The proper modifications were given in instructions of a different number. It is enough to give an instruction once. Reiteration would have been a fault which the court properly avoided.

Defendant's seventh instruction was not good law. It implies that if appellee knew of any apparent danger from which he did not suffer he could not recover. Certainly a knowledge of danger in general, which would not have existed except for a particular defect of which appellee had not notice or knowledge, is immaterial.

Defendant's 8th request is faulty for a similar reason. What Smith and appellee saw was not the danger from which appellee suffered.

Defendant's instruction 9 has the same defect as 7 & 8.

Defendant's instruction 10, to the effect that if the machine had been in use several years it should be deemed safe, was wrong, for the evidence, without conflict, shows that the machine had been dangerous during the whole time of its use.

Defendant's instruction 11, to the effect that if such machines were hab-itted and oiled they had been considered safe, is wrong, for the failure to keep it oiled could not have contributed to the injury.

203 Defendant's 16th and 18th instructions have the same fault as his instruction 10.

Defendant's request 26 is, in effect, that if appellee was disabled from heart disease, even if it were caused by the injury, that he could not recover.

As to the direction of the court to find special facts, that is a matter in the discretion of the court and no error. The instructions given by the trial court were correct and full, and were at least as favorable to appellant as the law would permit, and he cannot justly complain of it in parts or as a whole.

We find no error in the points above mentioned or in regard to any point or rulings excepted to.

Let the judgment be affirmed.

W. G. LANGFORD,
Associate Justice.

We concur.
GEORGE TURNER,
Associate Justice.
FRANK ALLYN,
Associate Justice.

Greene, Hanford, McNaught & McGraw, for appellants; Struve, Haines & McMicken, for appellee.

Filed January 16, 1888.

R. G. O'BRIEN, *Clerk.*

204 Journal, vol. 3, page 23.

MONDAY, *January* 16*th*, 1888.

THE COLUMBIA & PUGET SOUND RAILROAD COMPANY, Appellants,
vs.
WILLARD C. HAWTHORNE, Appellee.
} Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the district court of the third judicial district of Washington Territory, holding terms at Seattle, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now, on this 16th day of January, A. D. 1888, on motion of J. C. Haines, Esquire, of counsel for appellee, considered, adjudged, and decreed that the judgment of the said district court be, and the same is hereby, affirmed, with costs, and that the said Willard C. Hawthorne, appellee, recouver of and from the said The Columbia and Puget Sound Railroad Company the costs of this action, taxed and allowed at $81.55, and that execution issue therefor.

And it is further ordered that this cause be remitted to the said district court for further proceedings.

205 Journal, vol. 3, p. 38.

THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY
vs.
WILLARD C. HAWTHORNE, Defendant in Error.
} In Error. Allowance of Writ and Citation.

And now, on this 24th day of January, A. D. 1888, comes the said The Columbia and Puget Sound Railroad Company, plaintiff in error in the above-entitled cause, by Roger S. Greene and Cornealius H. Hanford, its attorneys, and gives the court to understand and be informed that a writ of error to the Supreme Court of the United States has been prosecuted in the above-entitled cause by the said The Columbia and Puget Sound Railroad Company, and presents to the court said writ and prays that said writ be allowed; whereupon it is ordered by the court that said writ be, and the same is hereby, allowed.

And thereupon, afterwards, upon the same day, comes the said The Columbia and Puget Sound Railroad Company, by its said attorneys, and presents to the court here a supersedeas bond, duly framed and executed by the said The Columbia and Puget Sound Railroad Company, as principal, and A. A. Denny and Bailey Gatzert, as sureties, in the sum of twenty-one thousand dollars, lawful money of the United States, conditioned as provided by law, and prays the court to approve and allow the said bond and the penalty therein and sureties thereon; and it appearing to the court that said bond and sureties are satisfactory to the said Willard C. Hawthorne, defendant in error, it is ordered by the court that said bond and the penalty therein and the sureties thereon be, and the same hereby are, approved and allowed; and on motion of said The Columbia and Puget Sound Railroad Company, by its said 206 attorneys, it is further ordered that a citation upon said writ of error issue to said Willard C. Hawthorne according to law.

207 No. 547.

In the Supreme Court of W. T., January Term, 1888.

THE COLUMBIA & PUGET SOUND RAILROAD COMPANY
vs.
WILLARD C. HAWTHORNE.
} Cost Bill.

Clerk's fees	$23 55
Binding transcript	
Sheriff's fees	
Printing brief	43 00
Attorney fee	15 00
Miscellaneous fees	
Total	$81 55

TERRITORY OF WASHINGTON,
County of Thurston, } *ss:*

J. C. Haines, being first duly sworn, says that he is of counsel for the defendant in error in the above-entitled cause, and that the foregoing is a true exhibit of the costs and disbursements necessarily incurred and expended in said cause and court, and that the same is true, as he verily believes.

(Signed) J. C. HAINES.

Subscribed and sworn to before me this 16th day of January, 1888.

R. G. O'BRIEN, *Clerk.*

[Endorsed:] No. 547. In supreme court W. T., *July* term, 188–. —— *vs.* ——. Cost bill. Filed Jan. 16, 1888. R. G. O'Brien, clerk.

208 THE UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States, of the October Term, 1888.

THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY
vs.
WILLARD C. HAWTHORNE.
} In Error.

Citation.

To Willard C. Hawthorne, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Washington, wherein the Columbia and Puget Sound Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 24th day of January, A. D. one thousand eight hundred and eighty-eight.

[Seal Supreme Court, Washington Territory.]

GEORGE TURNER,
Presiding Justice of the Supreme Court of Washington Territory in the Absence of the Chief Justice.

209 & 210 TERRITORY OF WASHINGTON, } *ss:*
County of King,

I, A. E. Hanford, being first duly sworn, on oath depose and say that on the 25th day of January, A. D. 1888, at Seattle, in King county, Washington Territory, I served the annexed citation upon J. C. Haines, Esquire, who, in the cause in the supreme court of Washington Territory, which, by the writ of error in said citation mentioned is sought to be removed to the Supreme Court of the United States, is one of (the law firm of Struve, Haines & McMicken) the attorneys of record for Willard C. Hawthorne, named in said citation, by delivering to and leaving with the said J. C. Haines, at said time and place, a true copy of said citation.

A. E. HANFORD.

Sworn to and subscribed before me this 25th day of January, 1888.

[Seal R. M. Hopkins, Notary Public, Washington Territory.]

R. M. HOPKINS,
Notary Public.

[Endorsed :] In the Supreme Court of the United States. The Columbia and Puget Sound Railroad Company *v.* Willard C. Hawthorne. Citation. Filed January 27th, 1888. R. G. O'Brien, clerk. R. S. Greene and C. H. Hanford, attorneys for plaintiff in error.

211 In the Supreme Court of the United States, of October Term, A. D. 1888.

THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY
v.
WILLARD C. HAWTHORNE.
} In Error.

Afterwards, to wit, on the second Monday of October of this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, District of Columbia, comes the said The Columbia and Puget Sound Railroad Company, by Roger S. Greene and C. H. Hanford, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given by the supreme court of the Territory of Washington was given for the said Willard C. Hawthorne against the said The Columbia and Puget Sound Railroad Company, whereas by the law of the land the said judgment ought to have been given for the said The Columbia and Puget Sound Railroad Company against the said Willard C. Hawthorne; and the said The Columbia and Puget Sound Railroad Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment, and that it may have such judgment in the premises as to right and justice appertain, &c.

ROGER S. GREENE &
C. H. HANFORD,
Attorneys for said The Columbia &
Puget Sound Railroad Company.

212 [Endorsed :] In the Supreme Court of the United States. The Columbia and Puget Sound Railroad Company *v.* Willard C. Hawthorne. Assignment of errors. Filed Jan'y 27th, 1888. R. G. O'Brien, clerk. R. S. Greene and C. H. Hanford, attorneys for plaintiff in error.

213 In the Supreme Court of the United States.

THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY, Plaintiff in Error,
v.
WILLARD C. HAWTHORNE, Defendant in Error.
} Supersedeas Bond.

Know all men by these presents that we, The Columbia and Puget Sound Railroad Company, the plaintiff in error in the above-entitled cause, as principal, and A. A. Denny and Bailey Gatzert, as sureties, are held and firmly bound unto Willard C. Hawthorne, the defendant in error in said cause, in the sum of twenty-one thousand dollars, lawful money of the United States of America; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-third day of January, A. D. 1888.

Whereas the above-named The Columbia and Puget Sound Railroad Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in a cause wherein the said The Columbia and Puget Sound Railroad Company is plaintiff in error and the said Willard C. Hawthorne is defendant in error by the supreme court of the Territory of Washington and has claimed a stay of proceedings on said judgment:

Now, therefore, the condition of this obligation is such that if the above-named The Columbia and Puget Sound Railroad Company shall prosecute its said writ of error to effect and if it fail to make its plea good shall answer all damages and costs, then these presents shall be void; otherwise shall be and remain of full force and virtue.

COLUMBIA & PUGET SOUND RAILROAD CO.,
By A. A. DENNY, *Vice-President*,
And by T. H. TYNDALE, *Secretary*.
A. A. DENNY. [SEAL.]
BAILEY GATZERT. [SEAL.]

Sealed and delivered in the presence of—

I. A. NADEAU.
R. M. HOPKINS.

{Seal Columbia & Puget Sound R. R Co., Seattle, W. T., Incorporated Nov. 26, 1880.}

213½ TERRITORY OF WASHINGTON, *County of King*, } *ss*:

On this twenty-third day of January, A. D. 1888, before me, R. M. Hopkins, a notary public in and for said Territory, personally came A. A. Denny, Bailey Gatzert, and T. H Tyndale, to me known to be the individual- described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned; and the said A. A. Denny and T. H. Tyndale also acknowledged that they signed and sealed said instrument as the act and deed of the Columbia and Puget Sound Railroad Company.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal R. M. Hopkins, Notary Public, Washington Territory.]

R. M. HOPKINS,
Notary Public in and for Washington Territory.

SEATTLE, *Jan 23d*, 1887.

214 I have examined the foregoing bond and both it and the sureties are satisfactory to me.

J. C. HAINES,
Of Counsel for Def't in Error.

[Endorsed:] In the Supreme Court of the United States. The Columbia and Puget Sound Railroad Company *v.* Willard C. Hawthorne. Supersedeas bond. Filed January 24th, 1888. R. G. O'Brien, clerk. R. S. Greene and C. H. Hanford, attorney*f* for plaintiff in error.

215 THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY,
Appellant,
vs.
WILLARD C. HAWTHORNE.

Mem. of Costs.

Costs made in the supreme c't, per bill filed	$81 55
Filing assignment of errors	10
" præcipe for transcript to the Supreme C't U. S.	10
894 folios of transcript to Supreme C't of U. S. at 20 cents per folio	178 80
Certificate and seal to same	1 00
Total	$261 55

216 In the Supreme Court of Washington Territory, January Term, A. D. 1888.

THE COLUMBIA & PUGET SOUND R. R. CO.,
Appellant,
vs.
WILLARD C. HAWTHORNE, Appellee.
Certificate of Clerk.

I, R. G. O'Brien, clerk of the supreme court of the Territory of Washington, hereby certify the foregoing and attached writings from pages 1 to 193, inclusive, to be a true copy of a transcript of the record of the district court of the third judicial district of Washington Territory, holding terms at Seattle, upon which the above-entitled cause was tried and determined in the supreme court of Washington Territory, and that the further annexed paper-writings from page — to page —, inclusive, is a true and correct transcript of the record and all the proceedings had in the said supreme court upon the trial of said cause and the judgment of the court therein and all subsequent proceedings as the same now appears of record in my office at Olympia.

Seal Supreme Court, Washington Territory.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 7th day of March, A. D. 1888.

R. G. O'BRIEN, *Clerk.*

Endorsed on cover: Washington Territory supreme court. No. 240. The Columbia and Puget Sound Railroad Company, plaintiff in error, *vs.* Willard C. Hawthorne. Filed October 13, 1888.

Office Supreme Court U. S.
FILED.
MAR 8 1892
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 240.

THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY,
Plaintiff in Error,

vs.

WILLARD C. HAWTHORNE.

◆ ◆ ◆

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

BRIEF FOR PLAINTIFF IN ERROR.

ARTEMAS H. HOLMES,
For Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

No. 240.

The Columbia and Puget Sound
Railroad Company,
Plaintiff in Error,

vs.

Willard C. Hawthorne,
Defendant in Error.

Brief for Plaintiff in Error.

In Error to the Supreme Court of the Territory of Washington.

Statement of the Case.

This cause was brought by defendant in error, plaintiff below, in the District Court of the late Territory, now State, of Washington, against plaintiff in error, defendant below (Record, p. 1).

The action was to recover damages for personal injuries alleged to have been sustained because of defendant's negligence.

The complaint alleged that plaintiff, on October 28th, 1885, was engaged as an employee and servant of defendant in operating a certain machine known as a trimmer in a steam saw-mill owned and operated by defendant; that defendant owed plaintiff the duty of providing a good, safe and secure trimmer, with good, safe and secure machinery and apparatus for operating the same. That defendant carelessly, negligently, and unskillfully provided and caused to be used an unsafe, defective and insecure trimmer, machinery and apparatus for its operation. That while plaintiff was so operating the trimmer one of the pulleys, over which ran the belt transmitting the power to the saw which was part of the trimmer, without fault or lack of care on plaintiff's part, but solely because of the unsafe and insecure condition of the trimmer, machinery and apparatus, slipped from the shaft on which it revolved and struck and greatly injured plaintiff, to his damage $15,000, for which judgment was asked (Complaint, pp. 1 and 2).

Defendant's answer, admitting the fall of the trimmer and injury to plaintiff but denying all other material allegations, set up the defense that when the injury was sustained plaintiff, as servant and employee of defendant, the master, was employed to run, manage and operate the trimmer; that he had done so for twenty-eight days prior to the accident; that the pulley and trimmer was under the plaintiff's exclusive management and control; was so constructed that plaintiff saw every part of it, and plaintiff for a long time prior to the accident had full knowledge of its peculiar structure and condition; that it was plaintiff's duty to keep it sufficiently oiled and in repair; that plaintiff on the day of the accident negligently and carelessly failed to oil and keep it in repair; and that whatever injury plaintiff received was caused by his own carelessness and negligence, and not by any fault, negligence or lack of care of the defendant (Answer, pp. 4 and 5).

Upon the issues thus raised, except that plaintiff conceded by his reply (4th, at page 7, fol. 9) that at all times while he was running the trimmer it was his duty to oil the same once every day, and on the trial that it was his duty to oil it (p. 25, at end of fol. 25), a trial was had by the Court and a jury.

After plaintiff's evidence was all in and plaintiff had rested, defendant duly asked the Court to grant a nonsuit on the ground that plaintiff had failed to prove a sufficient cause of action for the jury. The motion was denied, defendant duly excepted and the exception was allowed by the Court (p. 92, fol. 82).

The defendant also requested the Court to give certain instructions to the jury, which instructions were refused or given in a modified form, to which rulings exceptions were duly taken (p. 175, at fol. 153, to p. 178, in fol. 156).

The jury on June 30th, 1887, found for plaintiff and assessed his damages at $10,000 (p. 9).

The Court also gave certain instructions or charge to the jury (pp. 189 to 200), to the giving of which defendant, by stipulation and order of the Court, duly made and filed exceptions upon a motion for a new trial (pp. 200 to 205).

The motion for a new trial was denied and defendant duly excepted (p. 208, fol. 183).

Defendant also duly filed Assignment of Errors upon the trial (pp. 208 to 213).

An appeal was taken to the Supreme Court of the Territory of Washington, where, on January 16th, 1888, that judgment was affirmed with costs (p. 219).

From that judgment the defendant company sued out the writ of error to the Supreme Court of the Territory of Washington, bringing the cause to this Court (p. 214).

Specification or Assignment of Errors Relied Upon.

FIRST.

The trial Court erred in admitting, against defendant's objections and exceptions, testimony for plaintiff showing that defendant had made changes in the trimmer and machinery after the accident, as follows:

> " Q. Do you know whether there has been any change made in that machinery or not since the accident ?
>
> DEFENDANT'S COUNSEL : We object to that. The rule is well understood, as your Honor has already given it in other cases, that a person is not bound to furnish the best known machinery, but to furnish machinery reasonably safe. It is not a question what we have done with the machinery in the last few years or months since the accident occurred, but what was the condition then.
>
> THE COURT : The rule is quite well settled, I think, Mr. McNaught, that where an accident occurs through defective machinery or defective fixtures or the machine itself, if that is shown to be true, then a change, repair, or substitution of something else for the defective machinery is admissible as showing or tending to show the fact. I think that is quite well settled.
>
> MR. MCNAUGHT : I thoroughly concur with the Court as to the rule.
>
> PLAINTIFF'S COUNSEL : We propose to show changes.
>
> THE COURT : I think it is admissible.
>
> DEFENDANT'S COUNSEL : We will save an exception.
>
> THE COURT : Exception allowed.
>
> A. There has been some change made since the accident.

Q. What changes?

A. There was a rod of iron put through the shaft, and the gammon nuts on the end of the rod to keep the pulleys on.

Q. If that had been there before or on the day that Mr. Hawthorne was injured state what, in your opinion, effect would it have had in regard to keeping the pulley on?

Defendant's Counsel: We make the same objection.

The Court: The same ruling and exception.

Q. What effect would it have toward keeping the pulley on?

A. I think it would have kept the pulley on.

Q. Has anything been done in regard to guarding or protecting the person working at the trimmer in that machine since then?

Defendant's Counsel: The same objection.

The Court: The same ruling.

A. There is.

Q. What is it?

A. There has been some plank put up underneath the pulleys, to keep the pulleys from falling down.

Q. If that had been there at the time that Mr. Hawthorne received the injury, what effect would it have had?

A. He probably would not have been hit by the pulley at all?"

[Quoted from evidence of plaintiff's witness, A. L. Spencer, on the direct examination, pp. 19 and 20, at fols. 20 and 21.]

SECOND.

The trial Court erred in refusing and denying defendant's motion to vacate and set aside the judgment and verdict for the reason and ground stated upon said motion, as follows:

"II. 2. Admitting of testimony showing a change made in the trimmer or machine in question after the accident, as set forth on pages 8 and 9 of the stenographer's report of the testimony" (being the testimony of Spencer quoted above from pages 19 and 20 of record). This motion appears at page 200, in folio 177 to folio 178, page 201, and the decision at folio 183, page 205.

THIRD.

The Supreme Court of Washington Territory erred in sustaining the action of the trial Court, in overruling and denying defendant's motion to vacate

and set aside the judgment and verdict, upon the ground of the admission of evidence that after the accident changes were made in the trimmer or machine by putting planks under the pulley so as to arrest its fall; and upon the ground of the admission of evidence that other changes were made after the accident, against defendant's objection and exception.

This question was raised in the Supreme Court by the defendant's assignment of errors, numbered II. and III., page 208, folio 187 to page 209, folio 188, and was passed on by that Court in its opinion, page 217, folio 201, and by its judgment, page 219.

FOURTH.

The trial Court erred in denying defendant's motion for a nonsuit, at the close of plaintiff's evidence, on the ground that plaintiff had failed to prove facts sufficient to constitute a cause of action.

The question was presented at folio 82, page 92, also upon the motion for a new trial, at page 201, under III., and again at page 209, VI. of assignment of errors.

FIFTH.

The Supreme Court of Washington Territory erred in affirming the action of the trial Court in denying and overruling defendant's motion for a nonsuit, on the ground that plaintiff had failed to prove facts sufficient to constitute a cause of action.

Plaintiff, by VI. of the assignment of errors, page 209, folio 188, presented the question sharply to the Supreme Court.

ARGUMENT.

POINT I.

The admission of evidence at the trial, that after the accident defendant had made changes in the trimmer and machine, was error.

The true rule is that the evidence should have been confined to the conditions and situations at the time of the accident; to the sufficiency, adequacy and condition of the machinery at the time of the accident.

The specifications or assignments of error marked "First," "Second" and "Third," are covered by this proposition, present substantially this same question, and will be discussed together.

The objectionable evidence was admitted almost on the threshold of the trial; upon the direct examination of plaintiff's second witness. The condition of the evidence at the time of its admission, reduced to narrative, was as follows:

The first witness for plaintiff, Koslowski, had testified on his direct examination, as follows:

Reside at Seattle; have so resided seventeen years; most of that time engaged in sawmill business; have been acquainted with defendant's sawmill, where plaintiff was injured, for four years. Have had twenty years experience in and about a sawmill in all kinds of work. Am acquainted with the operation of a trimmer and have seen the trimmer in defendant's mill.

That trimmer was constructed very simply, with a pulley; a belt ran over two loose pulleys. The pulleys, sort of a wheel, revolved over the shaft, made of gas pipe; the pulleys were kept on the shaft by being screwed on both ends with nuts, gas pipe nuts. The cap screws on the outside of the pipe.

I had charge of the lumber and charge of the trimmer when I worked at that mill. I knew of that pulley's falling off, can't remember when, but they nearly hurt me once. The nut came off and the pulley fell between me and a man. It weighed 40 or 50 pounds, about 12 inches in diameter, 6 inches wide, of iron.

I reported the fall of that pulley to the superintendent. I told him the trimmer broke down; to come and see for himself.

The trimmer was carried to the shops and fixed. I saw it running afterwards; there was not much change in its appearance after it was put back. Did not notice any change, or that there was any change in the nut.

Mr. Coleman, who is still in defendant's employ at the mill, was employed there October 28, 1885, when plaintiff was injured. He knew about the fall of the pulley I spoke of; he fixed it; he built the mill.

I don't know whether there was or was not anything about this trimmer to show which way that cap turned when put on. There was nothing I could see. I believe there were two holes in the pulley we put the pipe in, to oil it. The oil went between the shaft and the pulley. If you put too much oil in it would run out sometimes. Sometimes we put a little wooden plug in it to stop the oil.

On cross-examination the witness testified: I am not a mechanic; made myself a convenient man generally about the mill. The pulley I referred to fell between the years 1879 and 1883. I looked after the trimmer as long as I was at the mill, three or four years; saw that it was oiled; sometimes ran the trimmer myself; that was three or four years ago.

The second witness for plaintiff, A. L. SPENCER, then testified, on his direct examination, as follows:

Reside in Seattle; have resided there nearly eighteen years; business, saw-milling. Am working in defendant's mill, where this accident is said to have occurred. Saw the accident occur. Have been working about machinery and in saw-mills twenty-two years. I have run planers and all kinds of machinery in saw-mills. I have run a trimmer. Have been working in this mill six years, running the planing machine, and am working there now. Am acquainted with plaintiff, and have been five or six years. I was employed in the saw-mill when this accident occurred. Plaintiff, as regards health and strength, was a pretty good sort of a man. His ability to work was rather more than the average of the common run of men.

When I first entered the service of the mill he was running a slab car. We had been running the trimmer about two weeks when this accident occurred. I was working, when the accident occurred, about twenty-five or thirty feet from the place where plaintiff was injured.

Describing this trimmer in my own way: I don't know that I could exactly. The trimmer was a hanging trimmer, hung overhead by a shaft hanging on some posts or beams, and the beam and saw swung out across a table, where they ran the lumber across to cut it off and trim it. The belt ran up on each side of the trimmer, then ran diagonally across to a shaft that drove the trimmer. There was a shaft directly across the trimmer. There was a pulley on each end and a belt ran over and down around the saw to drive the saw. There was a handle to hold the saw with—saw frame—and you pulled it back and forth. When you pulled the shaft forward, the shaft that the pulleys ran on went with the trimmer—with the frame of the trimmer.

There was a pulley down on one side and then on the other. The pulleys were about twelve inches by ten inches and weighed about sixty pounds. They ran on a piece of gas pipe, and were held on by a nut screwed on the outside of the gas pipe. I never took notice of the nut particularly. I never saw it put on. To my knowledge there was nothing but this nut to hold the pulley on. I never before saw a trimmer with a piece of gas pipe for a shaft.

I could not swear which way the nut turned. If the nut screwed on the same way the pulley ran, I would not judge there was a chance to come off; but if it ran the other way, I should judge there was. On machinery, generally, they do not put nuts on to run the same way the pulley does. To my recollection, I never saw a nut turning that way on heavy machinery like this. I think if the nut was properly put on, and if it had plenty of oil, there was no danger of it coming off if it did run that way.

If the nut ran in the opposite direction and had been properly put on and had plenty of oil, I don't think there would have been any need of its coming off. There was no occasion for anything of that kind to happen, if it had plenty of oil, if it had not some cause for rubbing together. If the babbett metal between the wheel and the nut was all gone, and it had plenty of oil, it would not make any difference.

There had not been anything done in the way of putting a bolt through the shaft, and staying it in that way. If there had been a bolt put through it would have held it on.

Here follows the evidence and the rulings objected to, quoted under the first specification or assignment of errors (*supra*, pp. 3 and 4).

Under the circumstances of the case it was error to admit the evidence showing that, after the accident, defendant had made changes in the trimmer and machine.

A careful examination of the books fails to disclose any decisions of this Court upon the rule of evidence in such cases, unless *Vicksburgh Railroad vs. O'Brien*, 119 U. S., 99, pp. 103 to 106, is an authority in point. But in the courts of last resort in most of our States the rule has been much discussed, and is now fully established.

The unanimous opinion of the New York Court of Appeals in *Corcoran vs. Village of Peekskill*, 108 N. Y., 151, p. 154, states and discusses the rule and the reason of it. That opinion is as follows:

Earl, J.: Whether the area was sufficiently guarded so as to protect travellers upon the street from falling into it, was a question of fact for the determination of the jury. It was, however, a close question, and, therefore, the defendant had the right to have it submitted to the jury upon strictly competent evidence. The plaintiff, against the objection of defendant, was permitted to prove that after the accident a fence was built around the area by the owner of the property, which substantially protected travellers against any danger from the same. This evidence we think was incompetent. Such evidence has sometimes been received by courts in cases where the party sued for an accident has soon thereafter made repairs or improvements for the purpose of making the machine or structure which caused the accident more secure, convenient or safe, and its admissibility has been defended on the ground that the act of making the repairs or improvements was an admission that the machine or structure was theretofore imperfect, out of repair or unsafe.

We think, however, that such evidence does not tend to prove that the party sued knew, or was bound to know, that the machine or structure was imperfect, unsafe or out of repair. After an accident has happened, it is ordinarily easy to see how it could have been avoided; and then for the first time it frequently happens that the owner receives his first intimation of the defective or dangerous condition of the machine or structure which caused or led to the accident. Such evidence has no tendency whatever, we think, to show that the machine or structure was not previously in a reasonably safe and perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it more perfect, safe and secure.

While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury. Hence in this Court, and generally in the Supreme Court, it has been held erroneous to receive such evidence. In *Salters vs. Del. and Hudson Canal Company*, 3 Hun, 338, it was held erroneous to admit evidence to show that after the accident the railroad company changed the character of its switch. LANGDON, J., writing the opinion, said: "The plaintiff was permitted to give evidence to the effect that after the accident the defendants substituted a target switch for the common one. Within the ruling in *Dougan vs. Champlain Transportation Company*, 56 N. Y., 1, this seems to be error. Whether the defendants were negligent was a question to be decided upon the facts as they existed at the time of the injury. What the defendants did afterwards was immaterial, unless their acts could be construed as equivalent to their declaration that they were negligent at the time of the injury. But the question appears to be settled by authority and not open for discussion in this Court." In *Payne vs. Troy and Boston Railroad Company* (9 Hun. 526), the action was to recover damages for an injury to plaintiff's horse, received while passing over a crossing upon defendants' track. The plaintiff was allowed, against defendant's objection and exception, to show that shortly after the accident the defendant took up the planks at the crossing and replaced them by new ones. This was held to be error. LEARNED, P. J., writing the opinion, said: "The only way in which such subsequent acts could bear upon the question would be as an admission that they had been negligent. So a jury would be likely to understand such proof. Yet it would plainly be unjust to the defendants that they should not take additional precautions against accidents without the risk that these precautions should be construed into an admission of prior negligence. To put down a new plank was an act which the defendants might do for various reasons. Yet it would be easy to argue from that act to a jury, that the defendants themselves knew that the crossing had been badly constructed or was out of repair. It seem to me that this evidence was improperly admitted, and that a new trial is therefore necessary." In *Dugan vs. Champlain Transportation Company* (56 N. Y., 1), plaintiff's intestate slipped from the deck of a steamboat under the outer railing and was drowned, and proof was offered by the plaintiff that after the accident the defendant boarded up the space between the railing and the deck; and this Court held that the evidence was properly excluded. GROVER, J., writing the opinion, said: "This was immaterial; its negligence is to be determined by what was known before and at the time of the accident." In *Dale vs. Delaware, Lackawanna and Western Railroad Company* (73 N. Y., 468), the plaintiff was a passenger in one of defendant's cars and was seated near an open window with his elbow on the window-sill, and while passing over a bridge his elbow was struck by some substance and his arm broken. It appeared that some months after the accident the bridge was removed and replaced by an iron one with trusses that did not rise as high as the window-sill. Testimony was received under objection to the effect that on the new bridge the distance was greater than the old one. The Court charged the jury that they might take that fact into consideration in determining whether the defendants were not guilty of negligence in allowing the old bridge to remain. This charge was held to be erroneous.

In all the cases to which we have thus called attention the change or improvement after the accident was made by the defendant in the action. But here the additional protection against danger was erected after the accident by the owner of the adjoining property, who had no connection whatever with the defendant. Even if it could have been claimed that this act, if it had been done by the defendant, or under its orders, would in any degree have been a confession that the area was previously insufficiently protected, and that thus the defendant had been previously negligent, yet the act of a stranger certainly could furnish no legitimate evidence against the defendant; and we cannot say that it did not have some influence upon the jury in reaching their verdict.

The Supreme Court of Connecticut, in Malley vs. The Hartford Carpet Company, 51 Conn., 524, after stating that the question involved had not been previously discussed in that Court, considers the subject, the rule prevailing in other States, and adopts the rule which prevails in the New York Courts and contended for here.

In Missouri, in Hipsley vs. The Kansas City, &c., Railroad Co., 88 Mo., 349, p. 354, the rule is announced that the evidence must be confined to the situation at the time of the accident.

In Minnesota, in Morse vs. Minneapolis, 82 R. R. Co., 30 Minn., 465, p. 468, the Court formally overrules its former decisions in such cases and adopts the rule contended for.

In Iowa, in Hudson vs. Railroad Co., 59 Iowa, 581, the same rule prevails.

In Massachusetts, Menard vs. B. & M. R. R. Co., 150 Mass., 386, the same rule obtains.

The admission of the evidence and the rulings objected to, quoted under the first specification or assignment of errors, was in violation of defendant's rights. Thereby the jury were allowed to conclude, not only that the defendant was negligent, but that it conceded that it was negligent, because, after the accident, changes in the machinery were made and additional safeguards, to prevent such another accident, were taken.

It had not been shown, nor had defendant conceded, that the accident had occurred through defective machinery or appliances.

The Supreme Court of the Territory of Washington, in passing upon the question upon the appeal taken to that Court, say in the opinion, page 217, fol. 201 :

> "Appellant made objections to the admission of evidence that after the accident the appellant put plank under the pulley so as to arrest its fall if it should come off in the future.
>
> "Acts and words of a party which expressly or impliedly are admissions against interest are admissible. The putting of plank to stop the falling pulley is a declaration that the pulley is liable to fall, for the plank are useless for any other purpose. If the change of the situation by appellant might have been made for an entirely different purpose the rule might be different."

The error of the Court below, the illogical character and viciousness of the rule applied, and the disregard of plaintiff's rights is demonstrated by the language quoted ; and the cases cited above establish the error of such a rule.

It is not possible for the Court to determine that defendant was not injuriously affected by the objectionable evidence, or what weight was given to it by the jury. Nor does it appear, beyond a doubt, that the error complained of did not and could not have prejudiced the rights of defendant. The judgment should therefore be reversed.

Vicksburgh & Meridan R. R. vs. O'Brien, 119 U. S., 99, p. 103.

POINT II.

The Court erred in denying defendant's motion for a nonsuit, at the close of plaintiff's evidence, on the ground that plaintiff failed to prove facts sufficient to support a verdict for plaintiff.

The specifications or assignment of errors marked "Fourth" and "Fifth" present substantially this same question, and will be treated together under this point.

The questions discussed under this point cover all the exceptions and objections raised upon the trial (excepting the errors alleged as to the admission of evidence, discussed under Point I.), because the evidence on the part of defendant did not substantially vary the case made by plaintiff.

The facts established after the plaintiff's case had been closed, and on which the motion to dismiss was made, were these :

Plaintiff, forty-seven years old, had been in the lumber business as carpenter and working around lumber for seven or eight years before the injury. Was running the trimmer for defendant when injured, and had been ten or twelve days prior. Had been in defendant's employ a month and a half. Did not think he really understood anything about running a trimmer.

Had run a trimmer some before at Seabeck. That trimmer was not constructed the same as defendant's trimmer. That one was slung down even with the floor and came up through the floor. Before the accident he knew the pulley of defendant's trimmer was kept on the shaft by a nut ; was told that when the pulley turned it turned the nut on. Had to do with oiling the pulley ; oiled it three or four times a day. There was a hole through the nut and the oil-can was stuck through the hole and the oil put through into the shaft; then a plug was put in the hole to keep the oil in.

Was not told or warned by any one, on the morning of the accident, not to use the trimmer. It was oiled that morning in the usual way. Noticed nothing unusual in the condition of the trimmer that morning.

Plaintiff was sawing wood-posts. Had started to saw. That was all he knew about the accident. Became conscious again at his home. Has been almost helpless since accident. Badly hurt and physically incapacitated. Prior to injury was able-bodied (Plaintiff's direct Examination, pp. 84–88).

Plaintiff did not know much about machinery or running a trimmer when he commenced to work for defendant. Had never run a similar trimmer before. The pulley on this trimmer differed from the one at Seabeck. The latter was a large wooden one drove onto the drum of the arm the saw was on. Never examined pulleys on defendant's trimmer; merely went up to oil them (Plaintiff's Cross-examination, pp. 88 to 91).

Kollowski and Spencer described the machinery and trimmer and testified as summarized at pages 6 to 8, *supra.* Spencer testified to the falling of the pulley and its striking plaintiff; that the pulley had come off before while he was employed at the mill. Said it came off four times in six years--the nut got loose and rattled off. The master mechanic of the mill was notified of the fall of the pulley on the previous occasions (fol. 21).

On the day of the accident witness Spencer thought plaintiff knew the pulleys and trimmer were in bad condition. On the morning of the accident Spencer stepped over from where he was working and told plaintiff he had better look out for himself; that the pulley was likely to come down and he might get hurt (pp. 27 and 28). What attracted Spencer's attention was that the shaft of the pulleys shook; had the impression that something was wrong; that the pulleys would come down or the shaft would come down—the whole rig. They were shaking more than ordinary. That Mr. Smith, the sawyer, had also attracted plaintiff's attention to the condition of the pulleys that morning. Plaintiff, when Spencer called his attention to the dangerous condition of the machinery, the trimmer in question, said: "All right; I will look out the best I can—do the best I can" (p. 23). Plaintiff continued his work. If there was plenty of oil on the axle of the pulley, it would have run on the shaft until it wore entirely out (fol. 29). In Spencer's opinion the trimmer was out of order because the babbett metal had melted and the shaking of the pulley caused the nut to come off (fol. 29). Neglect to oil it was the cause of the melting of the babbett metal. (It was conceded that it was plaintiff's duty to oil it—the pulley, Spencer's Cross-examination, fols. 22-27.)

Spaulding; engaged in saw-mills six years in all capacities. Employed in defendant's saw-mill several years, helped build it, was foreman. Knew about this trimmer. The trimmer was the same as all trimmers in the frame. Describes the nut as above. Frequently put on the nut and the babbett metal. The thread of the nut or cap was right-handed. The pulley ran left-handed with reference to the thread. If the pulley bore on the nut enough to cause friction it would turn it off. It was the usual, the only way of putting on nuts in that case, because it is the only way threads are cut on gas pipe. In saw-mills the thread is usually cut the opposite way from the way the pulley is turned, to keep the nut on. Had known of this pulley falling before. That must have been caused by the babbett metal melting out. It was always considered safe enough when the babbett was in proper shape in the pulley (fols. 31-33). Witness considered it safe—it was generally considered safe—if the babbett was all right. When the babbett got melted out the pulley would rattle and jam. As long as the babbett was then all right it was considered safe. It was a very easy job to screw the nut up. The former times the pulley fell the master mechanic or witness replaced it (fol. 33). Witness called mill superintendent's attention to fact that the construction of this trimmer was unusual as to the line that ran through the frame of the trimmer, the angle of the shaft, the manner in which the belt was kept on the pulleys—the belt used to often run off if the shaft canted a little (fol. 36).

Plaintiff's witness Shehan (fols. 37 and 38), Morris (fols. 39-42), Bullene (fols. 43-46), Reitze (pp. 51-53), Anderson (pp. 53-54) and Brown (pp. 55-59) all testified to having worked in saw-mills for some years, had worked in or examined other trimmers as well as defendant's trimmers; Morris, that he had seen two other trimmers similar to defendant's; Bullene had seen a similar one at Commercial Mill, in Seattle; in other respects these witnesses testified that in general the nuts were put on trimmers to turn opposite to the way the saw turned, because thereby the tendency was to tighten up the nut; and that it was not safe to have the nut turned on, as was the case with defendant's trimmer in such way that when the pulley turned ahead the nut would turn off. That defendant's trimmer had been in almost constant use since it was built, seven or eight years previously.

The remainder of plaintiff's witnesses—Dr. Smith (p. 59), Hawthorne (pp. 59-64), Dr. Baker (pp. 65-68), Dr. Miller (pp. 69-77), Mrs. Hawthorne, plaintiff's wife (pp. 77-83), and Tichener (p. 83), all testified to the physical and mental injuries and to plaintiff's physical incapacity, the result of the injury sustained, all of which are conceded to have been severe and serious.

Appellant insists that upon this condition of the proofs, upon which plaintiff rested, he had failed to establish the two propositions essential to any recovery. namely: Plaintiff's freedom from negligence which contributed to the accident or injury, and any negligence of defendant.

The facts and circumstances in the case at bar, when plaintiff rested his case, are fully and fairly within the rule declared by this Court in Chicago and Milwaukee Railroad vs. Ross, 112 U. S., 377, at pp. 382 and 383, in these words:

> " The general liability of a railroad company for injuries caused by the negligence of its servants to passengers and others not in its service is conceded. It covers all injuries to which they do not contribute. But where injuries befall a servant in its employ a different principle applies. Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them, he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or in law is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid. There is also another reason often assigned for this exemption—that of public policy. It is assumed * * *
>
> But however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of the risks thus incurred that he should himself be free from negligence He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fail in that respect, and an injury result, he is liable to the servant as he would be to a stranger. In other words, while claiming such exemption, he must not himself be guilty of contributory negligence."

That rule was reaffirmed in *Northern Pacific Co. vs. Herbert* in 116 U. S., 642, p. 647, and follows the rules applied in Hough vs. Railway Company, 100 U. S., 213.

The rule is restated in Washington, &c., R. R. Co. vs. McDade, 135 U. S., 554, at p. 570.

The case at bar is within the rules declared in the above cases.

Plaintiff's proofs established that he knew the condition of the machine; knew that the pulley had fallen before; knew that it was liable to fall unless kept properly oiled; that he failed to oil it; that he was warned that it might fall.

The accident and injury was within the ordinary risks incident to and assumed by plaintiff in the performance of his specific services.

No negligence on the part of defendant could be predicated upon the proofs as they stood when plaintiff rested his case.

Defendant had performed its duty as master; as master, defendant had furnished a reasonably safe place and suitable and reasonably safe machinery and appliances for the performance of plaintiff's duties. The machine was under plaintiff's control. He might have done simple things—oiled the machine or reported its condition to his superiors or ceased to work it, either of which would have prevented the accident.

Upon plaintiff's proofs it was shown that the trimmer was not an uncommon one; that three other similarly constructed machines were in use in the neighborhood; that on such machinery, generally, the nuts were turned on in the opposite direction from that in which the pulleys turned, but no sawmills in which the trimmers were so constructed were pointed out; that when properly oiled defendant's trimmer was safe.

Within the rule that

> " defendant was not a guarantor of the safety of its machinery, and
> " was only bound to use ordinary care and prudence in the selection
> " and arrangement and care thereof, and had a right to use and em-
> " ploy such as the experience of trade and manufacture sanctioned
> " as reasonably safe."

Approved in Washington, &c., Co. vs. McDade, 135 U. S., at page 569, and restated at page 570. No negligence on defendant's part was shown.

The motion for a non suit should have been granted.

Kane vs. Northern Central Railway, 128 U. S., 91, 94.
Gunther vs. Insurance Co., 134 U. S., 110, 116.
Bunt vs. Sierra, &c., Mining Co., 138 U. S., 483.

POINT III.

The judgment of the Supreme Court of the Territory of Washington should be reversed, with directions to grant a new trial.

ARTEMAS H. HOLMES,
For Plaintiff in Error.

Office Supreme Court U. S.
FILED.
MAR 24 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE COLUMBIA AND PUGET SOUND RAILROAD CO., PLAINTIFF IN ERROR, *v.* WILLARD C. HAWTHORNE, DEFENDANT IN ERROR.	*No.* 240.

BRIEF FOR DEFENDANT IN ERROR.

JOHN B. ALLEN,
Attorney for Defendant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1892.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE COLUMBIA AND PUGET SOUND RAILROAD COMPANY, PLAINTIFF IN ERROR,
v.
WILLARD C. HAWTHORNE, DEFENDANT IN ERROR.
No. 240.

Brief for Defendant in Error.

STATEMENT OF THE CASE.

Defendant in error recovered judgment against plaintiff in error for injuries sustained while operating a trimmer in its saw-mill. It is charged the employer provided an unsafe and defective trimmer, of which it was fully informed, and respecting which defendant in error was ignorant and was not warned by plaintiff in error, and the latent nature of the defect causing the accident was such, in the exercise of reasonable diligence and skill, it was not discovered by him. It is alleged, with the exception of oiling it once a day by defendant in error, the repairing, supervising and management of the trimmer was under the exclusive control of the plaintiff in error. That while thus employed, a pulley over which the belt ran, transmitting power to the saw of the trimmer, slipped from the shaft about which it was revolving, and falling about eight feet on the head and shoulder of defendant inflicted the injuries complained of.

Motions for non-suit and for a new trial were overruled; exceptions were taken to the admission of certain evidence and to many of the instructions given the jury.

In vindication of the verdict and the action of the court in refusing a non-suit, the following narrations of, and citations from, the evidence are made:

Wm. D. Koslowski testified that he had twenty years' experience in saw-mills, and four in this one, doing all kinds of work, and that he was assistant foreman at the time of the accident, looking after the lumber and machinery. He described the pulley in question as weighing forty to fifty pounds, revolving loosely around a stationary shaft made of gas-pipe and kept from flying off by the usual gas-pipe cap or nut screwed on the end of the pipe. That at one time, while thus employed, the cap came off and the pulley had fallen, nearly striking him, and he had reported the fact to the superintendent, and also to Campbell, who was master mechanic of the mill at the time of the accident in question; that no changes had been made in the pulley and shaft.

That the oiling was done by pouring oil in the gas-pipe through a hole in the cap or screw, and it reached the pulley through some small perforations in the shaft at the point over which the pulley was revolving. (Transcript of Record, p. 10.)

A. L. Spencer testified he had worked with all kinds of saw-mill machinery for twenty-two years, and in this mill for six years. He described the shaft and pulley as the foregoing witness, and further stated the position of this shaft was horizontal, except when inclined in certain movements of the carriage of the trimmer. (Transcript of Record, p. 16.)

He stated that nuts holding wheels and other revolving machinery are put on to turn with such machinery. If not so put on, the tendency of the friction is to turn off the nut.

Was working in the mill at the time of the accident, and about twenty-five or thirty feet away, and saw the nut and pulley fall, the latter striking plaintiff on the head, knocking him senseless. He had seen the nut and pulley fall before, and thinks Mr. Campbell, who at that and the time of the accident was master mechanic, sent a man to put them in place again.

A. P. Spaulding testified he had worked in the entire construction of the mill, and had been foreman for three years in operating it. Described the shaft, carrying the pulley loosely revolving about it, as a piece of gas-pipe two and a half inches in diameter, with a nut or cap, common to such pipe, screwed on the end to keep the pulley from slipping off. Pipe tongs with handles two to two and a half feet long were used in turning the nut.

He stated the thread was so cut the nut or cap would come off if turned in the way the pulley revolved, which was contrary to the usual and proper method. (Transcript of Record 31.)

Q. Did you ever see this pulley fall?
A. I don't think I ever saw it fall—no, sir.
Q. Did you ever know of its having fallen?

A. Yes, sir.

Q. Was that while the present company was running the mill?

A. Yes, sir.

Q. Do you know the cause of its falling?

A. I presume it must have been caused by the babbitt's running out. It was always considered safe enough when the babbitt was in proper shape in the pulley.

(Question by a juror). Was there a set-screw or anything on the end?

A. No, you could not. It was just a common cap on gas-pipe. The cap was about an inch and a quarter long, turned on to the end of the shaft of gas-pipe.

Q. (By the juror): Do you consider that safe?

A. Well, yes. It was generally considered safe if the babbitt was all right. Of course, when the babbitt got melted out the pulley would rattle and jam up against the end. I have seen the cap worn half an inch where the pulley had run down on to it. As long as the babbitt was there all right it was considered safe? I considered it safe enough.

By Mr. Haines:

Q. Safe enough provided (cut short)——

A. Provided everything was right.

By Mr. McNaught:

Q. Provided the babbitt was in?

A. And the nut was screwed up, as it ought to be screwed up, hard with the pipe tongs.

By Mr. Haines:

Q. State whether that was an easy job or not to screw that nut up?

A. Very easy.

Q. And if the nut was not properly screwed on hard what would you consider?

A. Then it would rattle off, of course, when there was any friction.

Q. Could a person unacquainted with the construction of that machine, Mr. Spaulding, that was running the trimmer there, tell the manner in which the nut was put on?

A. No, sir; not unless he put it on himself.

Q. Who put the nut on the machine when it came off?

A. The foreman of the mill or Mr. Campbell, the master mechanic.

Q. These times that it fell while you were there, who replaced it?

A. Sometimes I did and sometimes Mr. Campbell did. We used to take the pulley off and rebabbitt it. Sometimes Mr. Campbell, or one of the men in the machine shop of the mill when Mr. Campbell was away.

Q. Mr. Campbell—what position did he occupy, if any, there?

A. Master mechanic.

Q. Do you know what position he occupies now?

A. Master mechanic, I believe, still.

(Transcript of Record, pp. 34 and 35.)

Henry Shehan testified he had worked eleven years in saw-mills and had run trimmers, and that he had worked two or three months in this mill prior to the accident.

Q. How were the pulleys kept on?

A. I don't remember how that was; I never noticed it.

Q. How are the trimmers usually constructed?

A. Well——(pauses).

Q. How are the pulleys; are they loose pulleys?

A. No, sir.

Q. How are they constructed?

A. They are put onto a shaft and it revolves.

Q. The pulley and the shaft, both together?

A. The pulley and shaft, both.

Q. In this trimmer, does the shaft revolve at all?

A. No, sir.

Q. The pulleys revolve on the shaft?

A. Yes, sir.

Q. Did you ever operate this trimmer?

A. I have.

Q. Did you ever know, while you were employed there, any of these pulleys to come down?

A. It came down while I was there and I quit work.

Q. Do you know the cause of its falling once?

A. I don't know; I suppose the nut came off; I don't know.

Q. Do you know about the shaft; whether the pulley slipped from the shaft or not?

A. The pulley came right down alongside of me.

Q. Who was master mechanic of the mill at that time?

A. Mr. Campbell always done the work around there. Mr. Colman was (interrupted)——

Q. Do you know whether Mr. Campbell is employed about the mill there now?

A. I think he is. I don't know. (Transcript of Record. p. 39.)

George W. Ballene, after stating he was United States Inspector of Boilers for the Puget Sound District, and had for forty years been a machinist and was acquainted with that used in saw-mills, proceeds:

Q. Did you ever notice whether when the saw was pulled out for the purpose of using it in trimming whether that made any difference in the angle at which the shaft lay?

A. Probably when the saw was pulled out through the cut the shaft would be on a level, I should judge, if I remember.

Q. When the saw was let back?

A. Well, it would stand on an angle of 10 or 12 degrees, may be. I don't know exactly, but from 10 or 12 degrees, may be more and may be less—that is, I mean that the end of the shaft was tipped down 10 or 12 degrees.

Q. Towards or away from the man who was operating the trimmer?

A. The declination would be towards the face of the trimmer.

Q. What effect would that have upon the pulley that was nearest him—suppose that the pulley was kept on the shaft by a nut or cap on the end of the shaft?

A. The consequence would be that the pulley would run against the nut or collar—whatever kept that on—all the time the saw was out of the cut, which would be most of the time.

Q. Suppose that the pulley was kept in place by a cap such as is put on the end of gas-pipe in order to seal up the end of the pipe, and the thread was cut so that the nut or cap turned off when turned in the same direction that the pulley revolved—that is, if there was any friction sufficient to bind them together, that the nut would have a tendency to turn off—that is, as the pulley went ahead—what, in your opinion, would that machinery be so far as regards safety?

A. If the nut turned off when the pulley was working (interrupted)——

Q. Would you consider a machine constructed in that manner a proper or safe machine for use in that place?

A. No, sir; I do not consider it a proper construction. It was rather an unusual construction, and seems to be used to avoid shafting or belting, or rather a way to get rid of expense in construction. I don't know whether they considered that or not. According to where they took their power from.

Q. Could a person who was operating that trimmer, and that person not a skilled mechanic especially—suppose that was a cap—tell which way that thread was cut without unscrewing it?

A. Probably not. (Transcript of Record, pp. 47 and 48.)

CHARLES F. REITZE.

Q. Did you ever see the trimmer in the mill of the Columbia and Puget Sound R.R. Co., where this accident to Mr. Hawthorne is said to have occurred?

A. Yes, sir; I have noticed it and examined it.

Q. How is that trimmer constructed?

A. Well, the trimmer is constructed a little different from ordinary trimmers. It has two idlers on top of the frame, and it runs a belt a quarter turn to work the saw.

Q. Are those pulleys fixed pulleys or loose pulleys?

A. Loose pulleys.

* * * * * * * *

Q. How are they located with reference to the man that works the trimmer?

A. Well, they are directly over him.

Q. And how is the shaft? What does the shaft run in?

A. It is what we call a counter-shaft that runs at the top of the frame, extending from one side of the frame to the other, and the pulleys are in the centre of the shaft.

Q. In this trimmer do you know how the pulleys were kept on the shaft?

A. Well, I noticed they were kept on with a nut at the end of the shaft.

Q. Suppose that the nut turned on—that is, that the thread was cut in such a manner that the nut turned off the same way the pulley revolved; would you consider that to be a proper or improper method of putting that in?

A. It would be a very improper method.

Q. Why so?

A In all our machinery, especially saw-benches, or anything of that kind, we always make the nut turn off opposite the way in which the pulley does, so that in case of the pulley or the saw getting stuck or fastened the nut will turn tighter instead of looser. (Transcript of Record, pp. 51 and 52.)

Other witnesses testified to the manner in which the cap was screwed to the shaft, which was not disputed.

Plaintiff testified he was forty-seven years old, a carpenter; that he had operated a trimmer at another mill, though not constructed like the one in question; that he had been working at this mill for a month and a half, and running the trimmer about ten days before the accident; that he oiled it three or four times a day; that no one had told him of the condition of the pulley or trimmer before the accident. (Transcript of Record, pp. 84 and 85.)

As indicating the rigorous test to which the plaintiff's proofs were subjected in being submitted to the jury, the following instructions are copied from the full and comprehensive charge:

INSTRUCTIONS OF COURT TO JURY.

1.

This is an action brought by the plaintiff to recover of the defendant damages for injuries received by the plaintiff while operating and running a machine called a "trimmer" for the defendant. It was the duty of the plaintiff, before undertaking to manage, run, and operate said machine, to inform himself of the duties and dangers peculiar to such work, and the plaintiff in entering upon and into such work assumed all the ordinary risks in connection therewith.

2.

Plaintiff is to be deemed as holding himself out, if no representations to the contrary were made, as possessing a fair measure of skill for the service he undertook to perform, and to be acquainted with the ordinary risks and dangers attendant thereon.

3.

I instruct you that the defendant was not under obligations, under all circumstances, to make use of the safest known appliances and instruments, nor is it responsible for a failure to discard one which is not such and to supply its place with something safer.

4.

The defendant is not an insurer of the safety of the machinery furnished, but it is to use ordinary care and diligence in the selection, construction, and maintenance of such machinery.

5.

It is the duty of the plaintiff to oil, inspect, and carefully and cautiously observe the condition of the machinery he was operating and running; and if the plaintiff failed so to do, then he was negligent in that particular. It was also the duty of the plaintiff to use reasonable care and caution in observing the condition of such machinery, and if he found, at any time, that said machinery needed repairing, or that the same was not in a safe condition to be used or was dangerous, it was the duty of said plaintiff to report such defective and dangerous condition of the said machine to the foreman, superintendent, or person in charge of said mill; and if he failed so to do, then said plaintiff was guilty of negligence in that particular, and if such negligence contributed to the injury complained of, he cannot recover.

6.

The plaintiff by his contract of hiring assumes the risks of injury, not only from the ordinary dangers incident to the employment, but also such dangers as are known to him or are discoverable by the exercise of ordinary care on his part; and if you find that the plaintiff continued to run this machine with knowledge that it was defective and dangerous or by the exercise of reasonable care and caution would have had such knowledge, without anything further appearing, and the plaintiff received the injury complained of, notwithstanding you may find that the defendant was guilty of negligence in furnishing said machinery and guilty of negligence in not keeping the same in repair, your verdict should be for the defendant.

7.

It is conceded by the pleadings that it was the duty of the plaintiff to oil said machinery; and if you find that the plaintiff did not oil the same in the manner and time that reasonable care and caution required him to do in managing and operating said machinery, and by reason thereof the babbitt on the inside of the pulley melted, and that said melting of said babbitt left said pulley in a defective condition, and that the accident in question was caused in whole or in part by said neglect of plaintiff, then your verdict should be for the defendant.

8.

You are instructed that it was the duty of the plaintiff, if he found the machinery called the trimmer or any part thereof was out of repair, to report the fact to the company, its officers, agents, or superintendents; and if he did not do so it was negligence on his part, and the company will not be liable for any injury sustained by him caused by said machinery being out of repair in any respect in which he so found it to be out of repair and failed to report it, or by reasonable care could have so found.

I instruct you that Mr. Smith or Mr. Spencer were not such officers or agents or superintendents of the defendant as that notice to them given by the plaintiff would be notice to the company.

11.

Where the only witnesses to a question in dispute are the two persons whose testimony on that disputed point is in direct opposition the one to the other, and the persons are of equal credibility, and there are no circumstances to shed any light on the transaction or strengthen the statements of either witness, the side in the controversy having the burden of proof must fail. The credibility of all the witnesses is exclusively a question for you to determine. In case of apparent conflict in the testimony, it is your duty to reconcile the apparent conflict if you can reasonably do so; but if you cannot do so, then you will consider the appearances of the witnesses, their demeanor on the stand, their opportunities of knowledge of the facts they testify to or the lack of opportunity, the interest of the witnesses, if any, and find the truth by carefully and conscientiously considering all the circumstances in evidence.

12.

I instruct you that the plaintiff is interested in the result of this action, and that fact should be considered by you in determining the weight to be given to his testimony.

The testimony of a person to the effect that he does not think that a certain fact exists or that he does not remember a certain thing is not entitled, other things being equal, to as much credit at your hands as the testimony of a witness stating positively that he did do a certain thing mentioned by him. In other words, other things being equal, the testimony of the plaintiff that he does not think that Spencer informed him on the morning of the accident, before it occurred, that the trimmer was in a bad and dangerous condition, is not entitled to as much credit at your hands as the testimony of Mr. Spencer, the plaintiff's witness, who testifies that he did so inform him.

28.

Gentlemen: In a general way, then, and as a general charge, I instruct you to lay aside any feeling of passion or prejudice that may exist, and examine this case upon the evidence here before you calmly, dispassionately, without sympathy or emotion, and let your verdict be the truth, as a verdict ought to be in this and in all cases.

I instruct you that an employer is not bound to furnish for the use of his employé the best possible instruments and machinery, but he is bound to furnish such instruments and machinery as are reasonably safe for the use to which they are applied, and the employé is not bound to use the utmost care and diligence in the service of the employer or in the use of the machinery furnished to him by his employer, but only reasonable care and diligence; nor is either presumed to know all possible dangers incident to the employment or the machinery furnished or used; neither is the employer presumed to warrant the employé against accident arising from the use of the machinery or the dangers incident to the business.

Each has a right to trust to the other and to rely upon the other for and to expect the exercise of reasonable care, prudence, and diligence, that ordinary care and prudence as well as diligence which a reasonably prudent, diligent, and careful man would exercise in the business, and under the circumstances incident to, accompanying, and surrounding it.

29.

The employé, by accepting the employment, assumes the ordinary risks of the business he engages in, and has a right to assume that the machinery and instruments furnished by the employer are reasonably safe for the purposes and business to which he is engaged. He is not presumed to know hidden defects in the machinery—such defects as are not apparent to him and do not become manifest in the ordinary use of it in the business in which he uses it and is expected to use it. He may know them, and if he does he is bound by the knowledge, but there is no presumption of such knowledge in the absence of proof. He has a right to assume and to act upon the assumption that if there is some hidden defect or secret fault in the machinery known to his employer, but not apparent and not manifesting or presenting itself to his observation by the use, care, and management of the thing itself in the business, that the employer will notify him of such fault or defect in order that he may be on his guard or refuse the extraordinary risk, if there be one, arising from such defect or fault.

30.

If the employé knows of a defect or fault in the machinery of which the employer is ignorant he is under the same obligations to notify his employer, and if he does not do so, and continues to use it in its defective condition, he does it at his own risk, and no blame can attach to the employer if injury thereby results to the person employed.

31.

If the machinery is reasonably safe, and in or by its use, or for any reason, it becomes unsafe, or defective, or out of repair, and the employé knows the fact, it is his duty and the employer has a right to rely upon him that he will give notice of the fact in order that it may be repaired and made safe; and if he does not give the notice, and injury results to himself from its unsafe condition, he is in fault himself, and the law leaves him to bear the burden. This is but common honesty.

32.

If the employer is negligent in the matter and the employé is also negligent, and the injury results partly from the negligence of each, the law does not attempt to apportion the loss between them. There is no certain rule by which it can be done if it was attempted; consequently the rule is established, and if it is right and just that if the negligence of the employé contributes to the injury he receives he cannot recover of the employer for that injury.

34.

It results from what I have said that an employer is not in any sense an insurer of his employé against injury resulting from his own neglect, but is responsible for an injury resulting to the servant from the negligence of the master to which the neglect of the servant did not contribute.

The acts of the defendant's agents in charge of this mill who manage and control it for defendant are the acts of the defendant.

35.

You should not allow sympathy for plaintiff to sway you or have any influence upon your minds in this case; nor should any consideration of the fact, or any suppositions, that defendant is able to pay damages and plaintiff may be poor or unfortunate, have any consideration whatever.

36.

The parties are entitled to equal and exact justice at your hands, and stand on a level here to be judged by the evidence and the law. Aside from all other considerations, you are to find the facts from the evidence alone.

ARGUMENT.

It is shown the pulley was not keyed to a solid steel shaft, revolving with it, as is usual, but it was hung to revolve upon a stationary piece of gas-pipe, two and a half inches in diameter, and kept from flying off by a nut or cap screwed on the end of the pipe, with the thread so arranged as to cause the cap to turn off instead of tighten with the friction of the revolving pulley.

It was proven the cap had thus been turned off and the pulley had fallen a number of times before in the experience of Mr. Campbell, who constructed the trimmer and who had charge of it and the machinery in the mill at the time of the accident, and that no knowledge of these facts or warning of this danger was communicated to defendant in error.

The evidence warranted a finding that the employment of defendant in error was confined to oiling and operating the trimmer, while the duty of regulating, repairing, and supervising it devolved on others present in the mill. The jury had evidence of the competency of defendant in error, and that he had acquainted himself, so far as opportunity afforded, with his duties and the machinery he operated. It was for the jury to decide whether one who possessed the skill of a carpenter, who had operated a trimmer before, and this one for a number of days prior to the accident, without criticism, possessed a proper measure of skill for the service.

It was for the jury also to decide what, if any, special skill was required to operate this trimmer, and especially under the evidence adduced tending to show the plaintiff in error, by its superintendent and other agents, retained the supervision and management and repairing of the trimmer.

The weight of evidence showed the injury occurred through a latent defect of which defendant in error was ignorant, and which he could not have discovered except by taking the machinery apart, which was foreign to his employment, and which could only be done with tools especially adapted to the purpose, which were not furnished him.

Huddleston *v.* Lowell Machine Shop, 106 Massachusetts, 282.

Mr. Hawthorne had the right to assume, without investigation, that the machinery furnished was reasonably safe. He had the right to assume that he would be told of latent defects known to the employer, and warned of those it was the duty of the master to have ascertained. He could not be called upon to anticipate that the rule of common sense and experience would be violated in the manner of screwing the cap to the shaft, and that knowledge of this fact on the part of the employer would be withheld from him.

Wharton on Negligences, sections 209, 210, and 211.

Baxter *v.* Roberts, 44 California, 187.

Speed *v.* Atlantic and Pacific R.R. Co., 71 Missouri, 303.

Bridges *v.* St. L., I., M., etc., R.R. Co., 6 Missouri, App. 389.

In Hough *v.* R.R. Co. (100 United States, 213), the Court says:

"But the obligation still remains to provide and maintain in suitable condition the machinery and apparatus to be used by its employés—an obligation the more important and the degree of diligence in its performance the greater in proportion to the dangers which may be encountered" (p. 218).

Wood's Master and Servant, sections 349, 385, 386.
Strahlendorf *v.* Rosenthal, 30 Wisconsin, 674.
R.R. Co. *v.* Fort, 17 Wallace, 553.
Huddleston *v.* Lowell Machine Shop, 106 Massachusetts, 282.
Patterson *v.* Pittsburg, etc., R.R., 76 Pennsylvania State, 415.
Walsh *v.* Peet Valve Company, 110 Massachusetts, 23.
Gildersleeve *v.* R.R. Co., 33 Michigan, 122.

Whether Hawthorne knew, or under the circumstances could be charged with the duty of ascertaining, the defects in the machinery causing the accident was a question for the jury. It was submitted to the jury under full and explicit instructions, respecting which plaintiff in error can find little room for criticism.

Wood's Master and Servant, sections 377 and 384.
Filer *v.* New York Central R.R. Co., 49 New York, 50.

It is the right of a plaintiff to have the issue of negligence submitted to the jury when it depends upon conflicting evidence or deductions to be drawn from circumstances respecting which there is room for differences of opinion among intelligent men. And this rule equally applies to contributory negligence on the part of the plaintiff.

Jones *v.* East Tennessee R.R. Co., 128 United States, 443.

Justice Miller, in course of the opinion dealing with these questions, says:

"But we think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others" (p. 445).

Fuller, Chief-Justice, in Dunlap *v.* Northeastern R.R. Co. (130 United States, 649), says:

"The circuit court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow as a matter of law that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish" (p. 652).

Spensley *v.* Lancashire Insurance Co. (54 Wisconsin, 433):

"The simple question is, whether the evidence in behalf of plaintiff, had it remained undisputed, and giving to it the most favorable construction it will legitimately bear, including all reasonable inferences from it, is sufficient to justify a verdict in favor of the plaintiff" (p. 439).

In such cases the burden of proof to show contributory negligence is upon the defendant. No proof was offered by the defense to show Hawthorne was not competent, or to show that he was informed or put upon his notice of the latent defect that caused the injury. The question of contributory negligence was rightly left to the jury under proper instructions.

In Washington, etc., R.R. Co. 135 (United States, 554) the law is thus stated: "As a general rule the question of contributory negligence is one for the jury, under proper instructions by the court, especially when the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences. * * * Upon every question in the case—the safety or unsafety of the machinery, the ignorance on the part of the plaintiff of the danger of it, and the negligence of the plaintiff at the time of the accident—the evidence was controverted and rendered the case just such a one as this court in Jones, * * * etc. R.R. Co. *supra*, said that a due ' regard for the respective functions of the court and jury would seem to demand that these questions should have been submitted to the jury '" (pp. 571–2).

A. T. Kinson and another *v.* The Goodrich Trans. Co., 60 Wisconsin, 141.

Knowledge of a seen danger which did not occasion the accident will not preclude a plaintiff from recovering for an injury caused by a latent defect, and of which he was ignorant. The fact that he assumes the hazard of the former will not preclude him from recovering if he is the victim of the latter.

Speed *v.* The Atlantic and Pacific R.R. Co. (71 Missouri, 304):

> " If the defendant's employees in managing the train were guilty of negligence, which was the proximate cause of the injury, and the injury would probably not have occured if the train had carefully and properly approached the cars with which it collided, although the usual warning may not have been given, the defendant was liable" (p. 311).

Strahlendorf *v.* Rosenthal 30 Wisconsin, (674):

> " But if there existed some extrinsic cause, known to the defendant and unknown to the plaintiff, which increased the hazards of such employment beyond its ordinary and

usual hazards, the defendant was bound to inform the plaintiff of the fact which thus increased the perils of the work" (p. 678.)

Evidence of the physical condition of plaintiff, his ability to earn money, and the trade or occupation he was following up to the time of the injury, was properly admitted.

The allegation of his complaint is: "That by reason thereof, * * * ever since October 28, 1885, he has been prevented from pursuing his business and from doing any work, * * * and maintained and received great and permanent mental and bodily injury, thereby rendering him ever incapable of performing any work whatsoever, and providing for his support and maintenance." * * * (Transcript of Record, p. 2.)

The defendant had the alternative of accepting the pleading in this form, or moving to make it more definite and certain as to what the business of plaintiff was.

Code of Washington, p. 50, section 95:

> "And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment, or may dismiss the same."

It could not lie by till trial and then claim insufficient notice.

Luck *v.* Ripon, (52 Wisconsin, 196):

Under a similar code and a like allegation, the court in that case says: "When the complaint states facts showing that the injury has been such as to render it impossible for the injured party to pursue his ordinary business, and damages are claimed for loss of time in such business, the plaintiff should be permitted to show upon the trial what his business is, and what damage he has suffered by reason of inability to pursue the same. Ordinarily the business of the plaintiff will be known to the defendant, and he will not be surprised at the introduction of evidence upon the subject. If, however, the defendant has no knowledge of such business, and desires to be informed thereof in order to be prepared for trial, he must move to make the complaint more definite and certain in that particular. He will not be justified in lying by until the trial, and then claiming that he is unable to meet that issue for want of notice."

Evidence was admitted of alterations in the machinery subsequent to the accident. At most, such testimony is but a circumstance to be weighed by the jury for what it is worth, and in the case at bar of no consequence because both the defect causing the accident and the defendant's knowledge of it were otherwise absolutely proven, with no attempt at contradiction.

The supreme court of Pennsylvania, after citing numerous cases in support of the rule, said: "Plaintiff offered to show that immediately after the accident defendant put up a gas-light close to the opening of the elevator door. The evidence should not have been rejected."

McKee *v.* Bidwell, 74 Pennsylvania State, 225.

In West Chester and Philadelphia R.R. Co. *v.* McElwee (67 Penn. St. 311) the court said: "There was no error in admitting the testimony of Charles Rourke that the track had been moved since the date of the accident. If it tended to show, as suggested, that the track was originally too near the office and shanty to permit the cars to be run on it without danger, then it was evidence of a fact proper for the consideration of the jury in determining whether due and reasonable care had been used by the

William Morris's testimony to the effect that the trimmer was not safe was properly admitted. He had worked for fifteen years in a saw-mill, and mostly with an edger and trimmer (pp. 42 and 43, Transcript of Record).

The admission of this testimony was within the discretion of the trial judge and is not subject to revision.

D. & C. Steam Tow Boat Co. *v.* Staws (69 Pennsylvania, 36):

> "It is a matter as much within the discretion of the court below, and if it appears the witnesses had any claim to the character of experts, the court will not reverse on the ground that their experience was not sufficiently special" (p. 41).

Instructions requested by defendant were properly refused. They made knowledge of one defect which had nothing to do with the injury, preclude recovery on account of another which was the proximate cause of it, though wholly unknown to plaintiff. The instruction did not limit knowledge to the defect occasioning the accident.

Objections made to separate instructions cannot be maintained when such instructions are construed along with other parts of the charge bearing on the same subjects.

The instructions to the jury must be considered in their entirety.

The different instructions are not to be wrested from their context and stand or fall in their isolated completeness, but are to be considered in connection with the enlargements, contractions, qualifications, and illustrations and explanations of them afforded in other parts of the instructions. Otherwise they fail of their purpose, and instead of becoming aids and guides to ordinary men in reaching practical and right conclusions, become occasions of confusion and entanglement in the trial court, and opportunities of tripping up adversaries in courts of review.

In the light of such construction the objections made to the different instructions of the court upon the trial cannot be successfully maintained.

Evanston *v.* Gunn (99 United States, 660):

It is said in the opinion: "Sentences may, it is true, be extracted from the charge which, if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled" (p. 668).

R.R. Co. *v.* Whitton (13 Wallace, 269):

"But it is not error for a court to refuse to give extended instructions, even though some of them may be correct in the propositions of law which they present, * * * if the law arising upon the evidence is given by the court with such fulness as to guide correctly the jury in its findings; * * * nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms in particulars considered apart by themselves which could not, when taken in connection with the rest of the charge, have misled a jury of ordinary intelligence" (pp. 290 and 291, R.R. Co. *v.* McCarthy, 96 United States, 265).

Continental Improvement Co. *v.* Stead (95 United States, 161):

The motion for a new trial will not be reviewed in this Court.

Indianapolis, etc., R.R. Co. *v.* Hurst (100 Supreme Court, 291):

"No error of law appearing on the record this Court cannot reverse the judgment because upon examination of the evidence we may be of the opinion that the jury should have returned a verdict for a less amount. * * * But that court, finding that the verdict was abundantly sustained by the evidence and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict and overruled a motion for a new trial. Whether its action in that particular was erroneous or not, our power is restricted by the Constitution to the determination of the question of law arising upon the record. Our authority does not extend to a re-examination of the facts which have been tried by the jury under instructions correctly defining the legal rights of the parties" (pp. 31 and 32).

JOHN B. ALLEN,
Attorney for Defendant.